

THE LAWYER'S ROLE IN CONSULAR VISA REFUSALS

by

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Consular visa processing is a central but often neglected area of immigration law. This *Briefing* updates the November 1990 *Briefing*,¹ and provides a guide to a critically important aspect of consular processing—the lawyer's role in review of consular visa refusals.

Many knowledgeable immigration practitioners know little about processing visa applications at consulates and avoid direct involvement in consular cases. Respected immigration treatises tend

to ignore the law as it relates to consular cases. While Congress shifted the authority to establish and review U.S. visa policy from the Department of State (DOS) to the Department of Homeland Security (DHS) in 2002, Congress seems little interested in legislation to reform consular visa processing, aside from adding enhanced security-related procedures.²

Reasons for Lawyer Lack of Interest. The primary reason for lawyers' indifference or aversion to involvement in the consular process is the fact that consuls have virtually absolute authority to make decisions concerning a client's case, with no meaningful review and no right for the lawyer to be present at the consulate to present legal arguments. A consular visa practice can be a humiliating experience—with doors to consulates barring entrance to lawyers, visa windows slammed shut, and telephone calls and letters left unanswered. As Jan Pederson, former Chair of the AILA Visa Office Liaison Committee states, "you have to know how to grovel" to be successful in a consular visa practice. At the very least, a lawyer has to be very persistent and extremely diplomatic.

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Need for Lawyer Involvement. Lawyers do a disservice to visa seekers and the practice of immigration law by avoiding involvement in consular processing, painful as it may be. Lawyers must assert their client's right to have the lawyer involved in consular processing. They should use the opportunities that do exist to present visa applications and to obtain limited review of visa denials. This may involve going to federal court, as did Peter Schey in successfully obtaining reversal of an E-2 visa revocation by a consular officer in Vancouver, Canada, and as has Margaret McCormick in suing the State Department for the denial of an immigrant visa by a consular officer in Honduras.³ Lawyers must continue to press for legislation that at least creates an opportunity for administrative review of visa denials. In 1990, the American Bar Association adopted a resolution supporting administrative review of consular visa denials and the right to lawyer presence at consular interviews.⁴ Similarly, the Administrative Conference of the United States recommended administrative review of visa denials and the right to lawyer presence.⁵ Since the early 1990's, the possibility of administrative review of consular visa decisions has largely been ignored. Immigration lawyers should actively encourage legislation and speak out on these issues at congressional hearings. Until the law is reformed, however, immigration practitioners must continue to write letters, send e-mails, telephone, appear in person, and, if appropriate, litigate consular cases.

Summary of Contents. This *Briefing* focuses on what lawyers should do when faced with visa refusals. It discusses: (1) preparing a visa application with review in mind; (2) obtaining review of visa refusals by the principal consular officer at the consular post; (3) requesting advisory opinions on legal matters from the State Department's Visa Office; (4) utilizing the Visa Office's "LegalNet" e-mail inquiry system; and (5) promoting legislative reform of consular visa processing.

CONSULAR ABSOLUTISM

Visa applications at consular posts occur in the context of consular absolutism. For 56 years the consular visa system has been controlled by the Immigration and Nationality Act (INA). At the time of the INA's enactment in 1952 court cases had already precluded judicial review of consular visa decisions on the basis that no statutory authorization for such review existed.⁶ The INA exempts consular visa decisions from the supervisory authority of the Secretary of State, and this has been interpreted as precluding administrative review of consular visa decisions.⁷ Therefore, under case law and interpretations of the INA, consular officers are regarded as having absolute, unreviewable authority to grant or refuse visas. Consular absolutism has often been criticized.⁸ This *Briefing* discusses several proposals for increasing the opportunities for review of consular decisions.

LAWYER PREPARATION OF CONSULAR VISA APPLICATIONS

Too often, immigration practitioners assume that if the consul is aware that a lawyer is involved, it may hurt more than help the applicant's case. This may be true in simple B-2 visa cases, because it would seem rather strange to hire a lawyer to obtain a visa to visit Disneyland. However, most other types of nonimmigrant and all immigrant cases, as well as some unusual B-2 cases, benefit from lawyer involvement. It is unwise to presume that a consular officer has an anti-lawyer prejudice. Even if the lawyer knows that a particular consul does not hold lawyers in high regard, courteous and carefully prepared representation ultimately benefits the client.

The State Department has formally recognized the importance and value of lawyer preparation of consular visa cases. In an AILA/Visa Office Liaison Committee Meeting, the Visa Office made the following statement:⁹

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There is an appropriate role for attorneys to play in the visa process; the involvement of an attorney in a visa case does not signify anything amiss. The majority of attorneys are aware of and adhere to the rules of the game. In the sometimes complex world of visas, a good attorney can prepare a case properly, weed out “bad” cases, and alert applicants to the risks of falsifying information presented to the consular officer. The attorney can help the consular officer by organizing a case in a logical manner; by clarifying issues of concern; by avoiding duplication of effort (reducing interview time); and by providing the applicant with the necessary understanding of the intricacies of the visa process thereby easing the pressure on consular sections to provide information to the applicant.

◆ **FAM Requirements: Recognize and Correspond with Lawyers**

Notice of Representation. The State Department’s Foreign Affairs Manual (FAM)¹⁰ requires consular officers to recognize a lawyer-client relationship and correspond directly with lawyers.¹¹ The FAM provides that a consular officer may accept a letter on printed letterhead from a lawyer asserting a lawyer-client relationship as proof of representation. U.S. Citizenship and Immigration Services (USCIS) Form G-28 is acceptable, but not required, as proof of a lawyer-client relationship. If the consular officer has reasonable doubt as to the representation claim, the consul must obtain confirmation of representation from the visa applicant. The Visa Office has advised consuls that it is improper to request information about attorneys’ fees or make any reference to attorneys’ fees.¹² Even though consuls are periodically reminded of this policy, complaints are still received by AILA that consular officers inquire into lawyer-client fee arrangements.¹³

Correspondence with Lawyers. Even when the applicant lives in the consular district and the lawyer is in the U.S., consuls are required to correspond directly with the lawyer. In all cases, consuls are permitted to correspond directly with the applicant as well, if a copy of the communication is given simultaneously to the lawyer.¹⁴ In immigrant visa (IV) cases, consular officers are required to notify the lawyer of record of action taken at the final immigrant visa appointment.¹⁵ However, many consulates do not comply with this requirement or if they do, they do so by way of a summary form letter.

Lawyer Cover Letters. Although some consuls may ignore the policy requiring correspondence with lawyers, lawyers should pursue the opportunity to correspond in order to assist clients in their visa applications. The authors’ policy, if unable to accompany the client to the consulate, is to provide every client visa applicant with a lawyer cover letter to the consul. In addition to listing enclosures, the cover letter should contain a summary of important facts and legal arguments. Also, an affidavit from the visa applicant, affidavits from other family members or relevant parties, and a letter from the employer can be included to present a fully documented application. Visa Office officials disagree with the proposition asserted in the infamous *Garrisi* tape (a videotape circulated by the State Department to numerous consular posts containing one convicted lawyer’s views on visa fraud) that detailed documentation is evidence of a fraudulent application.¹⁶

FAM Citations. In correspondence with consular officers, it is important to cite pertinent State Department regulations and provisions of the FAM, not only to advise the officer of the applicable law and policies, but also to indicate that you are well prepared and knowledgeable about your client’s legal rights. The FAM contains very useful information, in readable form, often written to support approval rather than denial of a case. For example, the FAM notes regarding INA § 212(a)(6)(C)(i)¹⁷ ineligibility (fraud or willful misrepresentation for the purpose of obtaining a visa, admission, or other benefits) contain several helpful statements that can be used to argue against a finding of inadmissibility.¹⁸ The FAM also contains helpful information about what is a crime involving moral turpitude and what is a conviction for purposes of finding ineligibility.¹⁹ Visa Office informal interpretations of the FAM can also be helpful in overcoming the possibility of a finding of inadmissibility.²⁰ The FAM’s well-organized Table of Contents will help lawyers decide which notes to cite in cover letters or briefs.

◆ **Lawyer Participation in the Visa Interview**

Post Discretion. The FAM provides that each consular post continues to have the discretion to establish its own policies regarding the extent to which attorneys and other representatives may have physical access to the consulates or attend visa interviews.²¹ Whatever policies are set must be consistent and applied equally to all throughout that consular post.²² If the lawyer knows that

lawyer presence may be permitted at the visa interview, the lawyer should consider appearing with the client at the interview. Not all consuls will require the lawyer to stand at the interview window. Some—though this is relatively rare—may invite the applicant and lawyer into the consul's office for a cordial and civilized interview. For example, the U.S. Consulate General in Vancouver, Canada currently has a policy of permitting lawyers to accompany their clients to the visa interview. The consular officer retains the discretion to decide to what extent the lawyer may participate during the interview.²³ On the other end of the spectrum, consulates in Mexico have barred lawyers from even entering the consulates, let alone allowing attorney representation during the visa interview.²⁴ Even the imperfect experience of talking with the consul through an interview window may benefit a client. Lawyers should always determine the particular procedure at a consulate before trying to appear.

Non-Interview Meetings with Consuls. Even at posts that do not permit lawyer presence at visa interviews, some consular officers will nevertheless meet with a lawyer to discuss the case generally and listen to legal arguments. The authors have had such general meetings with consular officers in Ciudad Juarez, Sapporo, Hong Kong, Taipei, Managua, New Delhi, Madras, London, and Vancouver. All of these meetings were arranged by appointment with the consular officer. At the meeting, the consular officers were provided with copies of relevant documents pertaining to the case and a summary of facts and legal arguments contained in a letter addressed to the consular officer. It is the authors' opinion that these presentations increased the client's chance of obtaining visa approval.

The best way to avoid the problems of consular absolutism is to carefully prepare and present the client's visa application from the outset. If review at the consular post or an advisory opinion is still necessary, these procedures will be aided by a carefully prepared and documented visa application.

Example: In E-2 "essential employee" visa applications for several Japanese roe/fish quality inspectors, the NIV consular officer in Sapporo had several questions and concerns about the presented applications. After attempting to deal with the issues via letter and phone calls, the author arranged an in-person meeting with the consular officer and flew to Sapporo to attend the meeting. The meeting was not part of a NIV interview but

was held in the consul's office, without the clients being present. After a full discussion of the cases, all of the visas were issued the next day.

REVIEW AT THE CONSULAR POST

◆ Visa Refusals

If a consular officer refuses a visa after determining that the applicant is inadmissible, the officer shall provide the applicant with a timely written notice that states the determination and lists the specific provision or provisions of law under which the applicant is inadmissible.²⁵

When a visa applicant is refused an NIV visa, the consular officer must first inform the applicant orally of both the section of law under which the visa was refused and the factual basis for the refusal, unless the information is classified, sensitive but unclassified (SBU), or was obtained from another U.S. government agency.²⁶ In any NIV case involving a refusal under any provision of the law, the post must also provide the applicant and any attorney of record with a completed Visa Refusal Letter (State Department Form OF-194), setting forth the ground(s) of refusal.²⁷ The consular officer must enter the reason for visa refusal into the NIV computer system in the "remarks" section, and annotate the upper right hand section of Form DS-156 with the date of refusal, initials of the refusing officer, and the section of law under which the applicant was refused.²⁸ If the case involves a permanent ground of inadmissibility, the consular officer must explain whether or not administrative relief (usually a waiver) is available.²⁹ If the case involves a non-permanent ground of inadmissibility, the officer should explore the availability of any means of relief, and inform the applicant of such.³⁰

The IV refusal procedures are almost identical to the NIV refusal procedures. Consular officers are required to inform the applicant orally and in writing with the provision of law on which the refusal is based, the factual basis for the refusal (unless such information is classified), any missing documents or other evidence required, the procedural steps that must be taken by the consular officer or Department, and any relief available to overcome the visa refusal.³¹ Consular officers must complete Form OF-194 Visa Refusal Worksheet and enter refusal information into the automated IV processing system which automatically updates the Consular Lookout and Support System (CLASS) entry.³²

Before initiating review at the consular post, the lawyer must be certain that the visa was actually refused. There are times when an applicant and the lawyer may wonder whether a visa was refused, whether the consular officer was seeking additional information, or whether the officer simply declined to adjudicate the application.

§ 221(g) refusals. In nonimmigrant visa (NIV) cases, the State Department regulations and the FAM require the consular officer to issue or refuse the visa at the time the application is executed and presented.³³ Even when there is lack of complete documentation, the consular officer is required to refuse under INA § 221(g) (lack of documents).³⁴ In this instance, the lawyer should not seek review at the consular post but should try to submit additional evidence. With INA § 221(g) refusals, a new Form DS-156 visa application need not be submitted when the applicant supplies additional documents in support of the application within one year of the refusal.³⁵ If one year or more has elapsed since the latest refusal, the applicant must submit a new visa application and pay the machine readable visa (MRV) fee again in order for the case to proceed.³⁶ The updated file is reviewed and the visa is either issued or refused.

Declining to Adjudicate. Despite the clear mandate of the FAM regarding adjudication of all NIV applications, the State Department admits, and lawyers experience, instances when consular officers will decline to adjudicate an NIV application.³⁷ This is not necessarily bad, because it may allow the applicant to resubmit the application at the same or another post without having to explain a prior refusal. However, applicants and lawyers must be careful not to assume that the officer has declined to adjudicate the visa if it is actually a refusal, recorded by the officer.

Quasi-Refusals. The FAM refers to “quasi-refusal cases.”³⁸ These are cases in which no formal application has been filed but where it appears to the consul from statements made or evidence presented that the applicant is ineligible for a visa. The pertinent State Department regulation and the FAM interpretation of that regulation are inconsistent as to what should occur in these instances. The regulation provides:³⁹

If the alien fails to execute a visa application after being informed by the consular officer of a ground of ineligibility to receive a nonimmigrant visa, the visa shall be considered refused. The officer shall then insert the pertinent data on the visa application, noting the

reasons for the refusal, and the application form shall be filed in the consular office.

However, the FAM provides:⁴⁰

If, after being informed of apparent ineligibility, the alien decides not to make a formal application, then that particular situation does not constitute a formal refusal, and it must not be reported as such by the post. A quasi-refusal entry, however, may be appropriate.

This contradiction leads to problems for the most well-informed visa applicant. How does one answer the question on the State Department Form DS-156 (Nonimmigrant Visa Application) regarding prior visa refusals in cases where an application was never submitted?⁴¹ Due to the confusion as to what constitutes a visa refusal, there is no clear answer to this question. The regulation should be amended to avoid the anomaly of a visa refusal where there was no application.

Quasi-refusal cases receive a different CLASS computer entry than do straight refusal cases.⁴² CLASS is the computer system available at most posts and used by consular officers to determine if there is a visa record on the applicant, either at that post or anywhere in the world. For visa denials, consular officers enter a code number in the applicant’s computer record that corresponds to the section number of the INA under which the application was denied. In quasi-refusal cases, consular officers are instructed to enter the appropriate quasi-refusal code that tracks to the potential ground of ineligibility. Lawyers have no access to the CLASS computer system, but must try to ascertain from their clients or the consular officers whether the visa was refused and under what statutory ground.

Elimination of “Application Received” Stamp. In April 1981, the State Department implemented a policy directing all posts to place a “refusal stamp” in passports for NIV and IV refusal cases. Under this policy, a uniform stamp stating the name of the post, the notation “Application Received,” and the date, were printed with indelible ink on the back page of the passport.⁴³ The existence of an “Application Received” stamp on the back page of a passport was a useful way of determining whether a visa had been refused, but the policy was also criticized for blocking the flight of would-be refugees and asylum-seekers and promoting the phenomenon of “refugees in orbit”—those who were denied entry by one country after another, accepted by no one, but fearful of returning to their own home countries.⁴⁴

Calling it the “end of an era,” the Department of State instructed consular posts in January 2007 to discontinue use of the “Application Received” refusal stamp.⁴⁵ The stated rationale for this change in procedure is that issuance and refusal data is readily accessible to consular and border officials in the Consular Consolidated Database (CCD). Lawyers should be prepared to closely interview clients regarding visa applications submitted after January 2007 because notations indicating prior visa applications and possible refusals will no longer be readily apparent from the presence of an “Application Received” stamp. For pre-January 2007 visa applications, lawyers should be mindful that the absence of an “Application Received” stamp is not dispositive of whether the application had been refused. Some refusals were entered into consular records and the computer entry system without the stamp being placed in the passport. Lawyers and visa applicants must take this into account when deciding how to answer consular questions about prior visa refusals.

◆ Reconsideration or Resubmission of Applications

In all IV cases, the applicant has one year after refusal to request reconsideration and need not file a new application or pay a new application fee.⁴⁶ In NIV refusals except § 221(g) refusals, the only way to obtain “reconsideration” by the original officer is to complete a new Form DS-156 and resubmit the application. Before seeking review by another officer at the consular post, the lawyer should gather all the facts to determine whether reconsideration or resubmission of the application is advisable.⁴⁷ The lawyer should consider contacting the refusing officer to discuss the grounds for refusal and what might be done to overcome the refusal.⁴⁸ If submitting a request to reconsider would appear to be productive, the request should be submitted in a professional manner, complete with a concise cover letter and indexed exhibits.⁴⁹ After providing the refusing officer sufficient time to review the request, lawyers should follow up with the officer for a decision.⁵⁰

◆ Review Procedures at Consular Posts

Limited Review by Principal Consular Officer. Because even the strongest and most carefully prepared case can result in denial by an arbitrary or inexperienced consular officer, lawyers must at times exercise the opportunity and right of review at the consular post. The State Department regulations provide for limited review of visa refusals in both IV and NIV cases.⁵¹ The regulations

provide that *all* visa refusals must be reviewed by the “principal consular officer or specifically designated alternate” at the post.⁵² The “principal consular officer,” also referred to in the FAM as the “reviewing” or “supervising” officer, is normally the direct supervisor to the adjudicating officer.⁵³ The principal consular officer is required to review the case, reach a decision, and reduce the decision to writing on Form OF-194 Visa Refusal Worksheet, as described above.

The regulations provide that NIV cases should be reviewed “without delay,” but state that if the applicant has indicated a desire to submit additional evidence, review may be “deferred for not more than 120 days.”⁵⁴ In IV cases, the review is also supposed to take place “without delay,” but the FAM interprets this to mean “on the day of the refusal or as soon thereafter as is administratively possible (no later than 30 days after the refusal, in any event).”⁵⁵ There is no time limit for how long a case requiring additional evidence may be deferred before the review is initiated.⁵⁶

The manner in which the principal consular officer conducts review of the visa refusals varies from post to post. Even though the regulations require the principal officer to review *all* visa refusals, the FAM procedural notes create an apparent conflict with respect to NIV review requirements. According to the procedural notes, “consular supervisors” must review “as many NIV refusals as is practical and at least 20% of all refusals.”⁵⁷ This procedural note is inconsistent with the regulations and encourages a review system in which some principal officers carefully review all visa refusals, others do not at all, and others go through the entire stack in a matter of minutes.⁵⁸ The FAM should be amended to reflect the regulations which mandate review of all NIV and IV refusals, not just 20%.

In consulates where there is only one consular visa officer, refusals are usually reviewed by a “consular supervisor” who has an official consular commission and title. To ensure meaningful review by an experienced consular officer, the Visa Office should permit review of one-post consular refusals by the Advisory Opinion Division of the Visa Office or by the chief consular officer of a nearby post, particularly if it is within the same country.⁵⁹

Reviewing Officer’s Options. The principal consular officer or designee who reviews the visa refusal has three options: (1) affirm the denial; (2) request an advisory opinion from the State

Department; or (3) assume “responsibility for the case by reversing the refusal.”⁶⁰ If the reviewing officer does not agree with the refusal, he or she must discuss the case fully with the original adjudicating officer before reversing the refusal.⁶¹ The reviewing officer cannot reverse an INA § 214(b) refusal (failure to establish nonimmigrant intent) without reinterviewing the applicant.⁶²

In IV cases, the FAM suggests that the reviewing officer should discuss the case fully with the refusing officer before referring the case to the Visa Office for an advisory opinion or reversing the refusal. Reviewing officers are instructed to pay particular attention to refusals of inexperienced officers. Interestingly, the FAM procedural notes state:

The principles of good management require that the junior officer be involved in any action possibly bearing on the junior officer’s judgment and performance. Also, in the course of discussion, the reviewing officer may become aware of additional facts which the refusing officer did not make clear in the refusal worksheet. Most important, the junior officer will learn more about the visa function and the application of some of the more complicated laws and regulations in visa work. Ideally, any differences will be worked out in the discussion and the refusing officer, not the reviewing officer, will take whatever action is necessary. Only if there is no resolution should the reviewing officer take the action specified in 22 CFR 42.81(c) [refer the case to the Visa Office for an advisory opinion or take personal responsibility for the case], and then only after the refusing officer has been informed what the action will be and why.⁶³

◆ Lawyer Involvement in Post Review

Although the review procedure mandated by regulations and the FAM is meaningless in most visa refusal cases, lawyer intervention can lead to meaningful review by the chief consular officer. Even if the case has already been perfunctorily “reviewed,” it is the authors’ experience that no chief consular officer will give this as a reason for denying further review. If the lawyer is present at the post at the time of the refusal, the lawyer should request to speak to the officer-in-charge to go over facts and legal issues. If the lawyer is not present at the post, the lawyer should either fax or e-mail the chief consular officer to request such review.

Talk With Experts. Before sending an e-mail or fax to initiate review, the lawyer should learn about the chief consular officer’s practices and procedures. The best way to do this is to check with “experts” in dealing with a particular country in question—AILA members who have particular experience with certain posts. For example: Allen Kaye and Michael Phulwani know about India posts; Kehrela Hodgkinson and Sharon Noble know about London; Eugene Chow knows about Hong Kong; Mark Ivener and Bryan Funai know about Japanese posts; Jan Pederson and Angelo Papparelli know about many European posts; Henry Chang knows about Montreal; David Garson and Lainie Appleby know about Toronto; Michael Davis and the authors know about Vancouver; and Kathleen Walker is familiar with Juarez, Mexico. Other AILA members are experienced in dealing with particular posts. The lawyer should also consult AILA’s *The Visa Processing Guide* and perhaps call or e-mail the author who prepared the article about the post in question to ascertain his or her views about the pertinent issues and procedures.

In talking with experts, the lawyer should find out who is the chief consular officer and whether he or she is amenable to discussing cases over the telephone. Experts may recommend what issues are particularly important to chief consular officers and how they will feel about reversing a junior officer. After such consultation, the lawyer may decide that it is better to resubmit the application, or in an IV case, to ask for reconsideration, rather than try to obtain review by a chief officer who will never reverse a junior officer.

E-mail, Fax, Phone, Letter. Before phoning a post, it is important to send a fax or e-mail advising that a phone call will follow. A fax or e-mail should cite the regulations providing for review and contain brief but pertinent arguments supporting reversal. The lawyer should advise when he or she will be calling—most posts prefer telephone calls after 2 p.m.

If the lawyer is unable or the chief consular officer is unwilling to discuss the case on the telephone, a detailed letter should be sent to the chief consular officer. Although regulations require a consular officer to keep copies of pertinent documents pertaining to a visa refusal,⁶⁴ officers often return all documents to the denied visa applicant. Therefore, it is advisable to include copies of pertinent documents in the letter. Citations to the FAM are also advisable.

Reinterview. Generally, it is helpful to suggest to the chief consular officer that he or she reinterview

the visa applicant. At the reinterview, the applicant can present additional documents to the chief consular officer so that there will be a face-saving reason to reverse a junior officer's decision.

Example: In a recent case handled by the author, USCIS approved an I-130 petition filed by a U.S. citizen mother on behalf of her step-daughter, verifying that the qualifying relationship exists. However, the applicant's immigrant visa application was later refused under INA § 221(g) by the U.S. Consulate in Ciudad Juarez, Mexico because the biological father was not present at the immigrant visa interview. An e-mail and fax were sent to the principal consular officer at the consulate detailing the facts and presenting legal arguments. The e-mail and fax pointed out that there is no legal requirement for the biological parent to physically appear at the interview if the biological parent is not the U.S. citizen petitioner. The author pointed out to the reviewing officer that a step-parent may petition his or her step-daughter so long as the step-parent relationship was formed before the child reaches 18, and that the original application contained evidence to support the bona fide marital relationship between the step-parents. The consular officer reversed the refusal and encouraged the applicant to reappear to receive her immigrant visa stamp.

Congressional Letters. In the authors' opinion, a congressperson's letter to a consulate or the State Department inquiring about a case usually does little to assist in reversing a consular visa refusal. If a client or the lawyer complains to a congressional office about a visa refusal, a congressional aide may write an "inquiry letter" asking about the status of the case. These letters generally are not welcomed by the State Department and consular officers. They almost always result in an explanation of the reasons for the refusal, rather than any positive action.

However, it may help to obtain a carefully prepared, supportive congressional letter rather than a general inquiry letter. If a congressperson writes a letter urging reconsideration of a visa refusal and describes the credibility or good standing of the applicant's family or employer in the U.S., these specific facts may sway a chief consular officer.

Example: A J-1 Training visa was denied by the consul in Lima, Peru for a potential airplane parts manufacturing employee who desired to come to the State of Washington for job training. The consul denied the visa on the basis that the applicant could not prove nonimmigrant intent, pursuant to

Section 214(b) of the INA, despite the author's arguments that the employee would return to Peru at the completion of the training to establish a branch office of the Washington employer in Peru. The author drafted a detailed letter for signature by one of Washington's U.S. senators describing their knowledge of the Washington company and the fact that the company was truly interested in setting up branch offices abroad. The congressional letter stated that the company had a good reputation and that its assertions should be believed. The potential trainee returned to the Embassy to submit another DS-156 application for the J-1 visa, with the congressional letter (after the letter had been faxed to the attention of the head of the NIV section by the Senator's office). The J-1 visa was issued.

◆ Record Disclosure

One problem in obtaining review of a visa refusal by the chief consular officer or designee is finding out what records or documents were considered in deciding to refuse the visa. The State Department regulations require the consular officer to inform all refused visa applicants of the provision of law or regulation on which the refusal is based⁶⁵ and the FAM requires the lawyer to be informed of the reasons for denial in IV cases (if the lawyer has specifically requested telegraphic notification and made arrangements for payment).⁶⁶ Nonetheless, the lawyer and applicant sometimes do not have the information and documents relied on by the consul in a visa refusal. The State Department's position is that such documents and information are exempted from disclosure by INA § 222(f), which provides: "The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential..."⁶⁷

Consequently, the courts have held that information contained within a visa application is exempt from the disclosure provisions of the Freedom of Information Act (FOIA) as matters "specifically exempted from disclosure by statute..."⁶⁸ The courts have held that the scope of INA § 222(f) requires that information contained in visa applications is confidential to third parties and also prevents disclosure to the applicant. The courts also interpret the law to preclude release of "information revealing the thought-processes of those who rule on the application."⁶⁹ Thus, lawyers must sometimes seek "review" without knowing all the cards held by the reviewing consular officer.

The FAM⁷⁰ clarifies that lawyers and applicants are disadvantaged if they mention FOIA or the Privacy Act⁷¹ in a request for release of information. The FAM concludes that visa records and information contained in the visa applicant's file are statutorily exempt from release under FOIA provisions.⁷² Because the Visa Office fears establishing a precedent if it voluntarily releases information pursuant to a FOIA or Privacy Act request, the Visa Office established a policy of refusing to release *any* information if mention is made of FOIA or the Privacy Act.⁷³ However, if no reference is made to those laws, the FAM does allow the following documents to be released to an applicant:⁷⁴

- (1) correspondence previously sent to or given to the applicant by the post;
- (2) civil documents presented by the applicant; and
- (3) visa applications and any other documents, including sworn statements, submitted by the applicant to the consular officer in the form in which they were submitted.

Generally, only copies may be released except for "original civil documents."⁷⁵

◆ **Mandatory Advisory Opinions Before Post Review**

There are special situations when the initial refusing consular officer is *required* to seek an advisory opinion from the Visa Office in Washington, D.C. A lawyer should ascertain whether one of these special circumstances is involved before attempting to appeal to the chief consular officer, since a request for review would be fruitless until the advisory opinion is issued. The FAM requires that if an advisory opinion is necessary, the officer must first refuse the visa under INA § 221(g)⁷⁶ (lack of documents) while the advisory opinion is obtained.⁷⁷ See below for more details on these issues.⁷⁸

ADVISORY OPINIONS

The Department of State's Visa Office Advisory Opinions Division (AOD) issues advisory opinions on a variety of legal questions and issues pertaining to IV and NIV matters. Members of Congress, lawyers, and individuals may initiate requests for opinions from AOD. AOD also renders advisory opinions to consular posts abroad on questions involving proper visa classification, specific grounds for visa eligibility, and other legal issues concerning visa applications.

The overwhelming majority of advisory opinion requests come from consular officers, with only a small number of advisory opinion requests coming from lawyers. Requests for advisory opinions have increased since the implementation of additional security measures after September 11, 2001.⁷⁹ The most common questions posed to AOD pertain to misrepresentation of material facts (INA § 212(a)(6)(C)), nonimmigrant visa classifications (particularly E, H-1B, and R), diplomatic visas, visa revocation requests, and unlawful presence (INA § 212(a)(9)(B)).

If the lawyer believes the refusing visa officer or the chief consular officer made a mistake of law in refusing an application, the lawyer should consider seeking an advisory opinion from the AOD.⁸⁰ The advisory opinion may result in a favorable decision for the applicant. The FAM provides for issuance of advisory opinions on legal matters for both NIV and IV cases.⁸¹ It is also possible to obtain an advisory opinion in a hypothetical situation. The Advisory Opinion Division has discretion whether or not to answer hypothetical questions, and may refuse to opine if it appears the lawyer is trying to foreclose the consular officer's authority in a given case by presenting a "fait accompli" letter to the officer referencing an opinion from the Visa Office.⁸²

◆ **DHS Consultation and Review Authority**

A 2003 Memorandum of Understanding (MOU) between DOS and DHS defines the two agencies' respective roles with regard to the issuance of advisory opinions.⁸³ Although the State Department will continue to issue advisory opinions and prescribe guidance concerning advisory opinions that may be sought by consular officers, it agreed to consult with the Secretary of Homeland Security concerning changes in that guidance.⁸⁴ In addition, the Department of State agreed to copy the Department of Homeland Security on all outgoing advisory opinions (both security-related and non-security-related).⁸⁵ The MOU further provides that advisory opinions are "without prejudice to the authority of the Secretary of Homeland Security to refuse or revoke a visa."⁸⁶ The Department of Homeland Security is granted access to all advisory opinions and may seek consultation concerning any opinion that may affect homeland security. Thus, lawyers should be aware that if an advisory opinion issue involves policy matters, the opinion process will be lengthy because of the need to consult with DHS.

◆ Legal Effect of Opinion

There is an apparent conflict between the INA and the State Department regulations concerning the effect of an advisory opinion. A regulation states that: "Rulings of the [State] Department concerning an interpretation of law, as distinguished from an application of the law to the facts, shall be binding upon consular officers."⁸⁷

However, the State Department interprets INA § 104(a)⁸⁸ (which provides that the Secretary of State does not have authority over consular visa decisions) as granting to consular officers absolute authority to issue and refuse visas. If a consular officer decides to ignore an advisory opinion, how could the Visa Office or DHS enforce compliance? In reality, the Visa Office would most likely request another consul in the post to issue the visa in accordance with the advisory opinion.

In *Garcia v. Baker*, the State Department took the position that the Advisory Opinion Division only offers "guidance" and that the "final decision-making authority over the question of whether to issue [the plaintiff] a visa rested with [the consular] officers."⁸⁹ The court ruled that it had no jurisdiction to consider the plaintiff's claim against the Visa Office for rendering an improper advisory opinion. The court opined that even if it found that the Advisory Opinion Division was incorrect, "there is a serious question as to whether granting plaintiff's prayer for relief would achieve the result they seek," since neither the court nor the Visa Office had authority over the consular officer.⁹⁰ Due to the lack of either administrative or judicial review requiring consular officials to abide by the rule of law, consular officials really do have total "final decision-making authority" and can, at least in theory, ignore advisory opinions.

◆ Processing of Opinion Requests

All advisory opinion requests submitted with the Visa Office are routed through the Office of Public and Diplomatic Liaison, Public Inquiries Division. The Public Inquiries Division reviews all requests to determine whether they involve factual or legal questions. If the Public Inquiries Division considers a request for an advisory opinion to involve a factual matter or a request for information, it may forward the request to the consular post or attempt to answer the question directly.

Organization and Staff of Advisory Opinions Division. Requests pertaining to legal issues are forwarded to the Advisory Opinions Division,

headed by Chief Officer Jeffrey Gorsky.⁹¹ There are ten full-time staff positions responsible for issuing advisory decisions within the Advisory Opinions Division. The staff includes both civil service officers, including three in attorney-advisor positions, and foreign service officers.

Requests Initiated by Lawyers. When a lawyer initiates an advisory opinion request, the general procedure is for the Public Inquiries Division to communicate with the consulate requesting its views on the issue. The AOD and the Public Inquiries Division communicate with posts by e-mail, cable, or diplomatic pouch, with e-mail being the preferred method of communication. By routing all requests through the Public Inquiries Division, the delays caused by AOD having to communicate with consular posts have been greatly reduced. By the time AOD receives the file and the request for an advisory opinion, the Public Inquiries Division should already have communicated with the post and obtained any necessary information. Thus, theoretically, AOD is able to respond directly to the inquiry, and the need for additional communication with the post by AOD is eliminated. The processing time for obtaining the opinion can be delayed considerably if the AOD needs to obtain a response from the post.

When initiating an advisory opinion request, lawyers should send the consular post a copy of the documents submitted to the Public Inquiries Division. If both the Public Inquiries Division and AOD are aware that the post has copies of all documents and information, it may be possible to communicate solely by e-mail or cable, rather than by diplomatic pouch. Lawyers also should include copies of all correspondence received from the consular officer. If the advisory opinion request is complete, the Public Inquiries Division and AOD may bypass contacting the consulate, which will save considerable time.

To avoid the delays caused by obtaining a report from the consulate, lawyers should encourage the consular officer to request an advisory opinion from the Visa Office. If this occurs, the lawyer can also provide a letter and possibly a brief to the AOD, giving his or her version of the legal issues. If the lawyer asks the AOD for additional time to submit evidence or legal arguments, the AOD should withhold its decision pending receipt of this information from the lawyer.

Processing Time. The time required for processing an advisory opinion varies according to the AOD's work schedule. Cases are not always

handled in the order received. Workload constraints at the different posts make it impossible for AOD to provide a standard time period for processing advisory opinion requests. However, once the Visa Office has all of the required documentation needed to resolve an issue, most requests are answered within 30 days.

Expedite Requests. If a lawyer can provide proper justification for expeditious handling, the AOD may grant expedited processing. For truly time-sensitive emergencies, such as diversity cases facing expiration or medical/humanitarian emergencies, lawyers may call or e-mail AOD directly without first contacting the Public Inquiries Division. Business necessity will rarely be considered an emergency and aging out cases generally are not considered to be emergencies because of the enactment of the Child Status Protection Act.⁹² Lawyers should be prepared to explain why expeditious handling is justified, remembering that virtually all visa applicants prefer to have their visa now rather than later.

HOW TO OBTAIN AN ADVISORY OPINION

◆ What to Include

Lawyers requesting an advisory opinion should present issues as succinctly as possible. Avoid excessive documentation, particularly documentation that involves factual issues that are not appropriate for advisory opinion review. The submission of excessive documentation to AOD results in additional work that can delay the process of issuing the advisory opinion. Advisory opinion requests should include the following information:

- if sent via e-mail, identify yourself as the lawyer for the visa applicant and request that the inquiry be directed to the Public Inquiries Division for an advisory opinion on a legal issue;
- full name, date and place of birth, and nationality of the visa applicant;
- consular post, name of consular officer, and post file number, if known;
- type of visa application;
- date application was submitted;
- visa decision (refusal or request for additional information);
- brief summary of undisputed facts relevant to the application;

- statement of legal issue(s) involved;
- relevant statutory sections, regulations, *Foreign Affairs Manual* (FAM) provisions, or other pertinent legal authority;
- discussion of how the law applies to the facts; and
- legal arguments.

Legal arguments may be presented in the form of a brief. Since three of the Division's ten staff members are lawyers, they are familiar with briefs.

◆ Where to Send

The preferred method of initiating an advisory opinion is by sending a request via e-mail to *legalnet@state.gov*. Lawyers who utilize this e-mail address will receive an automatic confirmation receipt. In addition to making the request via e-mail, an advisory opinion may be initiated by mailing the request.

E-mail legalnet@state.gov

Mailing Address

Office of Public and Diplomatic Liaison
Public Inquiries Division, Room L703
Department of State
2401 'E' Street, NW; Washington, D.C.
20520-0106

Public Inquiries Division

Tel: (202) 663-1225 / Fax: (202) 663-3899
Monday–Friday, 8:30 am–5:00 pm EST

Advisory Opinions Division

Tel: (202) 663-1185 (Front Office, for emergency cases or to check status)

◆ Criminal Issues

Concerning requests for advisory opinions in connection with criminal conviction issues, the FAM lists information and documents required to be included in the request. Before issuing an advisory opinion about whether a conviction is a crime of moral turpitude, a petty offense or a conviction at all under U.S. law, or concerning other related issues, the Division must receive certified copies of the following:

- (1) the charges forming the basis of the conviction;
- (2) the provisions of law in full on which such charges were predicated;

- (3) the judgment of the court;
- (4) in cases of expungements, a copy of or a citation to the procedural law setting forth the effect of the expungement; and
- (5) whenever applicable, the consular officer's determination as to the *value* of the goods involved in the crime if such information is not part of the record of conviction.⁹³

The FAM specifies that it is the consular post that must provide this information, but in the authors' opinion a lawyer should also be able to provide it, especially where the lawyer initiates the inquiry and especially when he or she does so in a hypothetical context.

MANDATORY ADVISORY OPINIONS

As noted above, there are several issues *required* by the FAM to be submitted to the Advisory Opinion Division.⁹⁴ Lawyers should be careful to make sure the consul actually does request an opinion on such issues. Be prepared to present the facts and legal argument on the client's behalf to the AOD, to supplement what is provided by the consul. Advisory opinions are required concerning the following issues:

◆ Fraud or Misrepresentation

In most cases, a consular officer must seek an advisory opinion from AOD before making an INA § 212(a)(6)(C)(i) determination.⁹⁵ Advisory opinion requests concerning this issue account for approximately 50% of all opinions processed by AOD.

To determine whether the applicant has willfully misrepresented a material fact to obtain an immigration benefit resulting in ineligibility for a visa under INA § 212(a)(6)(C)(i), the consul must interpret whether the claim of misrepresentation concerns a "material" fact or facts.⁹⁶ The Attorney General has defined materiality as follows: "A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either: (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded."⁹⁷

The second part of the Attorney General's definition has become known as the "Rule of Probability."⁹⁸ The FAM contains an excellent discussion of materiality and the Rule of Probability, including examples of what is and what is not a material fact.

The FAM requires all cases falling under the Rule of Probability in which the consular officer decides *against* the interest of the applicant to be submitted for an advisory opinion.⁹⁹ If the consul is to decide in the applicant's favor in a difficult case, consular officers are invited, but not required, to submit a request for an opinion.¹⁰⁰ The FAM lists for the consul what facts and information must be included in a request for an advisory opinion concerning this issue.¹⁰¹

As stated above, advisory opinion requests concerning the Rule of Probability account for more than 50% of all opinions processed by the AOD. If a lawyer requests an advisory opinion subsequent to a final visa refusal involving the Rule of Probability, the AOD will not issue another advisory opinion, because it would have already issued an opinion, assuming the consular officer requested an opinion as required by the FAM. If the consular officer failed to request a required opinion, the lawyer should seek a "hypothetical" opinion and use the response, if favorable, to submit the issue once again to the consular officer, pointing out that a formal opinion must be sought. Lawyers should inform the AOD if required opinions are not being sought by consular officers. Lawyers should become involved early in cases potentially involving a material misrepresentation. Lawyers can ask the AOD to delay rendering an opinion so the lawyer can submit legal argument. However, once the opinion is issued, it will be difficult—albeit possible—to obtain reconsideration of the opinion.

No advisory opinion request is required when an applicant for a visitor visa makes an express statement to a consular officer that he or she intends to accept authorized employment in the United States. The consular officer may make a finding of excludability for fraud or misrepresentation without requesting an advisory opinion.¹⁰²

Similarly, where an applicant for admission as a visitor or student makes an unambiguous admission of an intent to reside permanently in the United States, an advisory opinion is not required.¹⁰³

Finally, cases involving the use of fraudulent documentation (*i.e.*, job letters, school records, deeds, bank statements) to overcome the presumption of intending immigration under INA § 214(b) do not require an advisory opinion.¹⁰⁴

◆ What is a Benefit?

The ground of ineligibility under INA § 212(a)(6)(C)(i) includes fraud or misrepresentation involving "other benefits." The FAM requires con-

sular officers to request an advisory opinion in cases where the consular officer believes something constitutes a “benefit” under that law.¹⁰⁵ The FAM gives examples of certain benefits that do fall under § 212(a)(6)(C)(i), including requests for extension of stay, requests for change of NIV status, requests for alien employment certification, and several other examples.¹⁰⁶ In such cases the consular officer need not seek an advisory opinion.

◆ In Absentia Convictions

State Department regulations specify that a conviction *in absentia* (i.e., imposed while the person was not present) do not constitute a conviction within the meaning of the INA’s sections making criminal convictions a ground of exclusion.¹⁰⁷ Accordingly, the FAM requires consular officer officers to seek an advisory opinion in cases where the facts suggest that a conviction may have been imposed *in absentia*.¹⁰⁸

◆ Political Crimes

The INA provides that excludability may not be based on a criminal conviction if the crime was for a “purely political offense.”¹⁰⁹ The FAM requires a consular officer to request an advisory opinion if there is “any indication” that a conviction is of a political nature.¹¹⁰ The FAM states, “[i]t has been generally considered that the crimes of espionage, treason and sedition are ‘pure’ political offenses.”¹¹¹ This issue is ripe for the lawyer to present facts and information about political prosecutions in the particular country. Criminal prosecutions verge toward political persecution, and thus are not proper grounds of exclusion, when they are “obviously based on fabricated charges or [are] predicated upon repressive measures against racial, religious, or political minorities.”¹¹² If the punishment imposed for the conviction was cruel and unusual, or disproportionate, it may indicate that the conviction was for a political offense.¹¹³

◆ Military Deserters

Under INA § 212(a)(8)(B), persons who departed or remained outside the U.S. for the purpose of evading training or service in the U.S. armed forces in a time of war or declared national emergency are ineligible for a visa. This section includes persons who were U.S. citizens but who are now aliens applying for a visa. An advisory opinion must be requested before any deserter who subsequently received a discharge from the armed forces may be issued a visa.¹¹⁴ The Advisory Opinion Division will evaluate the disposition

of the desertion aspect of the case by the military to determine whether the alien has been relieved of ineligibility by the discharge.

◆ Returned Visa Petitions

Consular officers may return an approved visa petition to USCIS when the officer uncovers evidence that, had it been available to USCIS, would have resulted in the petition being denied. If USCIS reaffirms the visa petition and upholds its approval but the consular officer still believes that the petition should not have been approved and does not have any new evidence which was not previously considered by USCIS, the officer is directed to send the entire case to AOD for review and discussion with USCIS headquarters.¹¹⁵ If AOD believes there is merit to the officer’s arguments, it will send the issue to USCIS Headquarters for further review. However, if AOD finds no merit to the officer’s arguments, it will instruct the officer to proceed with processing the visa pursuant to the approved visa petition.

It should be emphasized that an advisory opinion is not required if the officer returns the reaffirmed petition to the USCIS because of substantial new evidence not previously considered by USCIS in its decision to reaffirm. AOD Chief Jeff Gorsky comments that this is an often-misunderstood note. If a consular officer obtains new evidence about a case subsequent to USCIS reaffirmation, the consular officer does not need to request an advisory opinion. The consular officer is entitled to send the new information back to the USCIS for further review. Conceivably, this could occur several times before an advisory opinion is required. The opinion is required only when the officer is dissatisfied with a USCIS decision based on undisputed facts.

◆ Invalidated Labor Certifications

If a consul desires to invalidate a labor certification, the consul must first request an advisory opinion on the issue from AOD.¹¹⁶ Invalidated labor certifications generally arise from misrepresentation of the applicant’s experience abroad or related issues of fraud.

ISSUANCE OF ADVISORY OPINIONS

When a consular officer requests an advisory opinion, the Visa Office will not issue a copy of the advisory opinion directly to the lawyer or applicant. AOD interprets INA § 222(f) (confidentiality of visa records) to govern advisory

opinions. However, the VO will send a letter to the lawyer or applicant explaining the substance of the advisory opinion, unless classified or other sensitive information is involved. Key advisory opinions are kept in a precedent file at the Visa Office in Washington D.C., but the file is not open to the public due to § 222(f) concerns, and is only for internal use.

COURT CHALLENGES

The Supreme Court has held that the power to exclude aliens is a fundamental aspect of sovereignty that inheres in both the executive and legislative branches of government.¹¹⁷ The Court has affirmed “[t]he power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.”¹¹⁸ These holdings often make it difficult to obtain judicial review of immigration decisions, and this is particularly true for consular decisions. In 1988, the Supreme Court declined to review a holding by the court of appeals that a consular visa refusal is not subject to judicial review.¹¹⁹ Nonetheless, there are steady signs of growth in the principle that the government in all its affairs must adhere to the rule of law, and may be held accountable to that principle in court. As shown by the cases discussed below, there is reason to hope that someday consular decisions will routinely be subject to judicial review, not only in cases where the decision is made on U.S. soil, but also when the decision is made beyond the shores of the U.S. Legislative proposals to guarantee judicial review are discussed in another section below.

An interesting and important issue is whether issuance of an advisory opinion by the Visa Office in the U.S. permits federal court jurisdiction over a challenge to an adverse advisory opinion. One basis for precluding judicial review of consular visa decisions is the fact that these decisions are made outside the territorial limits of the U.S. While some courts have extended constitutional protection “whenever and wherever the sovereign power of (the) government is exerted,”¹²⁰ the courts have consistently denied judicial review of consular visa decisions, with a few limited exceptions.¹²¹

In *Garcia v. Baker*, the plaintiffs asserted jurisdiction to sue the State Department, including the Chief of the Advisory Opinions Division, to challenge an adverse advisory opinion resulting in denial of an immigrant visa.¹²² The plaintiffs were a

permanent resident mother and her daughter. The mother petitioned for an immigrant visa on behalf of the daughter. The daughter’s visa application was denied in Honduras pursuant to former INA § 212(a)(19) (willful and material misrepresentation). The plaintiffs asserted jurisdiction on the basis of the Administrative Procedure Act.¹²³ An officer in the Advisory Opinions Division under former Chief H. Edward Odom was also a named defendant, having been the person who allegedly “rendered an unlawful ruling on a question of law relating to a finding of permanent excludability against plaintiff.”¹²⁴ The plaintiffs argued that the requirement of an advisory opinion in their case (pursuant to the “Rule of Probability”) brought the Visa Office into the case, giving the court personal and subject matter jurisdiction.

The *Garcia* plaintiffs based their argument to support standing and jurisdiction on a line of First Amendment cases. In *Abourezk v. Reagan*,¹²⁵ the Visa Office was involved because of the INA’s requirement of State Department certification to Congress that the alien’s visit would threaten national security.¹²⁶ The federal district court in that case, in finding jurisdiction, noted:

Such 19th Century decisions as *The Chinese Exclusion Cases*,¹²⁷ upon which the government relies, have largely been ignored in favor of a more enlightened jurisprudence. [T]he decision here was made not by a consular official stationed abroad but by high-level State Department officials pursuant to general guidelines. Thus, decisions which have refused to consider discretionary determinations of consuls have only limited application.¹²⁸

The *Garcia* plaintiffs, citing another Supreme Court decision,¹²⁹ asserted that they had a constitutionally protected liberty interest to live with immediate family members. The district court ultimately ruled against the plaintiffs and granted the defendants’ motion to dismiss based on lack of jurisdiction, standing, and justiciability.¹³⁰ It noted that “courts have consistently rejected attacks on consular decisions, whatever form they take.”¹³¹ The court remarked that neither the Attorney General nor the Secretary of State can require consular officers to grant or deny visa applications. The court also referred to a Second Circuit case, *Burrafato v. Department of State*,¹³² which held that “no constitutional right of a citizen spouse was violated by the denial of her alien spouse’s visa application.” In *Abourezk* and other cases cited by the plaintiffs, it was First Amendment constitutional rights that were given special treatment by

the courts.¹³³ Therefore, it is questionable whether challenges to advisory opinions not involving fundamental constitutional claims will be heard by the courts.

In *Shimizu v. Department of State*, a federal district court held it had jurisdiction to review the validity of a consular decision to *revoke* a visa.¹³⁴ In this case, the consul in Vancouver, British Columbia, revoked the plaintiff's E-2 visa. The plaintiff subsequently entered the U.S. in B-1 status and then sued both the INS and the State Department. The Court assumed jurisdiction based largely on a similar Ninth Circuit case.¹³⁵ However, in that case and in others, the courts assumed jurisdiction where the alien was in the U.S. at the time of the consular action.¹³⁶ *Shimizu* is the first case in which a court assumed jurisdiction to review a visa revocation when the alien was abroad at the time of the revocation. This case further weakens the absolute power of consuls abroad. Plaintiffs were represented by AILA member Peter Schey and others.

In *Patel v. Reno*,¹³⁷ the Ninth Circuit held that there is mandamus jurisdiction to compel a consular officer to make a decision on a visa application. In *Patel*, the wife and children of a naturalized U.S. citizen were the beneficiaries of an approved immigrant petition that was forwarded to the U.S. Consulate in Bombay, India.¹³⁸ The consulate, suspecting that the U.S. citizen husband was naturalized under false pretences by marrying an American citizen while still being married to his wife in India, returned the immigrant petition to the INS for further investigation and suspended action on the visa applications.¹³⁹ In its decision, the Court acknowledged that "[n]ormally a consular official's discretionary decision to grant or deny a visa petition is not subject to judicial review. However, when the suit challenges the authority of the consul to take or fail to take an action as opposed to a decision taken with in the consul's discretion, jurisdiction exists."¹⁴⁰

In *Rasul v. Bush*,¹⁴¹ the Supreme Court held that there is writ of habeas corpus jurisdiction to review the physical custody of aliens being held at the U.S. Naval Base at Guantanamo Bay, Cuba. The Court concluded that aliens may invoke habeas jurisdiction in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."¹⁴² The Court found that jurisdiction exists for aliens outside of the U.S. under both the General Federal Question jurisdiction and the Alien Tort Claims Act. The Court observed that "[t]he courts of the United

States have traditionally been open to nonresident aliens."¹⁴³ In, *Hamdan v. Rumsfeld*, another important Guantanamo case, the Supreme Court affirmed its own habeas jurisdiction despite the existence of the Detainee Treatment Act (DTA), which sought to strip federal courts of habeas jurisdiction for petitions filed by Guantanamo prisoners. At least in theory, *Rasul* and *Hamdan* support the argument that non U.S. citizens who are physically outside of the U.S., including visa applicants before a U.S. consulate, should be able to invoke federal judicial review.

OTHER WAYS TO QUESTION CONSULAR DECISIONS

◆ Visa Services, Public Inquiries Division

There are other ways for a lawyer to contact the Visa Office to question a consular officer's action or inaction. Visa Services, Public Inquiries answers requests for general information about visas and consulates or for a status report on the processing of a particular case if processing has been delayed.¹⁴⁴ If action appears to be taking too long, a telephone call, fax, or letter to Visa Services, Public Inquiries may result in an e-mail from the Visa Office to the post inquiring about the status of the case. Visa Services, Public Inquiries should not be used to question or challenge a visa refusal.

The Post Liaison Division is responsible for monitoring the policies and procedures of the various posts. If a lawyer has complaints about a particular post policy or procedure, as opposed to a complaint about an individual case, these complaints can be addressed by telephone or in writing to the Post Liaison Division. Generally, a response will be issued to the lawyer, either from the Post Liaison Division or from the Public Inquiries Division.

◆ AILA Liaison Meetings

Lawyers are reminded that AILA schedules regular meetings with the Visa Office. Lawyers should submit problems, issues, and complaints to the Chair of the AILA/VO Liaison Committee.

◆ Other Channels

As a lawyer becomes more involved in a consular visa practice, he or she will undoubtedly get to know various consuls and officials of the Visa Office. It cannot be denied that knowing whom to call and who has authority over certain

matters may assist in individual cases. However, the authors and other lawyers have observed that some consular officers have disdain for officials in the “ivory tower” of the Visa Office and reject Visa Office attempts to influence their decisions. Thus, attempts to obtain Visa Office assistance may be counterproductive in individual cases.

Unfortunately, there are few other channels available to challenge visa refusals. As discussed above, congressional involvement via standard status inquiries is often unproductive. Similarly, media attention probably has little effect on an overseas consular officer. Going to court is almost impossible. The limited channels for challenging consular decisions contributes to the high level of frustration involved in a consular practice.

LEGISLATIVE PROPOSALS

◆ The Right to Lawyer Representation at Visa Interviews

In Fiscal Year 2007, consular officers stationed overseas received over 8.5 million NIV applications.¹⁴⁵ They refused almost 25%, or approximately 2.1 million of these NIV applications.¹⁴⁶ Consuls have the authority to deny lawyer presence at consular interviews, deny any explanation of the reasons for a visa denial other than a citation to the pertinent statutory authority, and withhold access to the visa record. The increased duties of consular officers, combined with ever-increasing numbers of visa applications, leads inevitably to uneven or unfair treatment of visa applicants. Further, consular absolutism is contrary to the legal trend toward increased due process and meaningful review of administrative decisions in the immigration process.

The right to legal counsel is a fundamental right guaranteed in the U.S. Constitution.¹⁴⁷ Existing statutes arguably already require the State Department to permit lawyer representation at consular interviews.¹⁴⁸ Even if existing law does not require extending this right to visa applicants abroad, advancing notions of fundamental fairness and administrative due process require lawyer representation at consular interviews. Lawyer representation is permitted in virtually every other similar agency setting. Consular interviews should no longer be the exception to the rule. The INA and State Department regulations must be amended to provide for lawyer representation at consular interviews.

◆ Administrative and Judicial Review of Visa Refusals

Similarly, legislation should establish a system of administrative and judicial review of certain categories of consular visa refusals. The legislation should create a visa review pilot program, first at a few selected consulates, and gradually expanding the program as the cost and method of funding the program are evaluated.

Details of appropriate administrative review procedures are contained in the February 1990 American Bar Association (ABA) Resolution drafted by the author for AILA and the ABA.¹⁴⁹ The Resolution states that regulatory or statutory provisions establishing administrative review should provide that:

- a. a written explanation shall be provided by the consular officer of the factual and legal grounds for the denial of the immigrant or nonimmigrant visa;
- b. visa applicants and their attorneys shall have reasonable access to the visa application record, including, if applicable, copies of Visa Office advisory opinions;
- c. review may be initiated by either the U.S. sponsor/petitioner or the applicant;
- d. review shall be conducted by specially trained and independent administrative law judges within the State Department;
- e. decisions shall be based on the written record in the case and any additional written submissions from the U.S. sponsor/petitioner, the applicant, or the attorney of record, and by the consular officer;
- f. review shall be available for both questions of law and fact; and
- g. a written decision shall be issued, with explanation, upholding or reversing the visa denial.¹⁵⁰

Legislation should also authorize judicial review in federal district court of decisions by the administrative law judges after exhaustion of administrative remedies, pertaining only to questions of law, including whether the decision was arbitrary, capricious, or otherwise not in accordance with law.¹⁵¹ The legislation should grant judicial standing to both the U.S. sponsor/petitioner and to the visa applicant.¹⁵² Although AILA has taken a position in favor of judicial review of

consular visa decisions, both the ACUS Recommendation and the ABA Resolution do not call for judicial review.¹⁵³

In recent years the experience of review boards such as the Administrative Appeals Office (AAO, a part of USCIS), Board of Immigration Appeals (BIA, a part of the Executive Office for Immigration Review), Board of Alien Labor Certification Appeals (BALCA, a part of the Department of Labor), and the Board of Appellate Review and Exchange Visitor Waiver Review Board (Department of State), prove that administrative review need not be prohibitively costly.¹⁵⁴ It is possible to charge a reasonable filing fee to cover the estimated cost of administrative review. A carefully implemented pilot program should be able to control the costs and establish a viable method of funding.

Providing judicial review of visa refusals will not create a flood of judicial appeals. Now that there are administrative review boards for labor certification and other immigration cases, the quantity of appeals from BALCA, BIA, or AAO decisions to federal court has been relatively small. Only the most serious and egregious visa refusal cases will make their way to federal court.

CONCLUSION

Even before the right of representation and full consular review is guaranteed by legislation, lawyers must become more involved in consular processing, seeking informal review by chief consular officers and requesting advisory opinions from the Visa Office in appropriate cases. Further litigation must continue to expand the limits of judicial intervention in visa cases. Lawyer involvement and intervention is the primary safeguard against abuse of discretion and arbitrary decisions by consular officers.

ADDENDUM: GENERAL GUIDELINES

1. Lawyers should assert their clients' right to have the lawyer involved in consular processing.
2. Lawyers should provide visa applicants, except in routine visitor or student cases, with a lawyer cover letter to the consulate listing enclosures and summarizing important facts and legal arguments.
3. In correspondence with consular officers, lawyers should refer to pertinent State Department regulations and provisions of the FAM.
4. When permitted and when feasible, lawyers should appear at consular interviews or meet separately with consular officers to discuss cases and present legal arguments.
5. Congressional intervention should be utilized sparingly, when the Congressperson can provide a carefully prepared, supportive letter, rather than a general inquiry letter.
6. Lawyers should carefully examine visa rejections to determine whether the visa was formally refused, or whether the consular officer was seeking additional information under INA § 221(g) (lack of documents), was declining to adjudicate the application, or was making a "quasi-refusal."
7. Lawyers should consider requests to reconsider refused visa applications or resubmit the application to the original refusing officer.
8. Lawyers should consider seeking review of visa refusals by the chief consular officer at the post.
9. In seeking review by the chief consular officer, lawyers should check with AILA "experts" before dealing with a particular post.
10. Faxes or e-mails seeking review by the chief consular officer should cite regulations and the FAM provisions regarding review and state brief arguments supporting visa issuance.
11. Faxes or e-mails seeking review should be followed by a lawyer telephone call to the chief consular officer to discuss the case and to suggest a reinterview of the visa applicant.
12. Lawyers should encourage consular officers to request, or lawyers should request directly, advisory opinions on legal issues from the Advisory Opinion Division of the Visa Office.
13. Advisory opinion requests from lawyers should include copies of all letters and documents concerning the case, including letters from the consular officer.
14. For issues required by the FAM to be submitted to the Advisory Opinion Division, lawyers should make sure that consuls request an opinion and lawyers should provide legal input to the Division on the issue.
15. Lawyers should share the results of advisory opinion requests with other immigration practitioners, via *Interpreter Releases* or AILA publications.

16. Lawyers should utilize the Visa Services, Public Inquiries Division to request general information about consulates or to request the Visa Office to contact the post to inquire about a particular case if processing has been delayed.
17. Lawyers should forward complaints about particular post policies or procedures to the Visa Office's Post Liaison Division.
18. Lawyers should submit problems, issues, and complaints concerning consular processing to the AILA/VO Liaison Committee.
19. Lawyers should encourage legislation seeking administrative and judicial review of visa denials and guaranteeing lawyer presence at consular interviews.

References

1. Free, "The Lawyer's Role in Consular Visa Refusals," 90-11 Immigration Briefings 1 (Nov. 1990).
2. Section 428 of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002), 6 U.S.C. § 236; Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002 (Sept. 20, 2003), posted on AILA InfoNet at Doc. No. 03101641 and Doc. No. 03092913 (hereinafter MOU); see also "DOS Announces Completion of MOU with DHS on Visa Oversight Rules," posted on AILA InfoNet at Doc. No. 03093012. For a detailed discussion on enhanced security related measures, including Security Advisory Opinions (SAOs), see Loke Walsh and Wolsdorf, "Secure Borders, Open Doors: Consular Processing Issues in 2007," *AILA's The Visa Processing Guide, 2007-08 Ed.* (hereinafter *Secure Borders, Open Doors*).
3. See *infra* text accompanying notes 122-136.
4. Resolution adopted by the House of Delegates, American Bar Association (ABA), Report No. 103 (Feb. 12-13, 1990) (hereinafter ABA Resolution).
5. Recommendation 89-9, "Processing and Review of Visa Denials," Admin. Conf. of the U.S. (ACUS), 1 CFR § 305.89-9 (Dec. 15, 1989), reported in 66 Interpreter Releases 1153 (Oct. 16, 1989) (hereinafter ACUS Recommendation).
6. *U.S. ex rel. Ulrich v. Kellogg*, 30 F.2d 984, 71 A.L.R. 1210 (App. D.C. 1929), cert. denied, 279 U.S. 868 (1929).
7. INA § 104(a), 8 USCA § 1104(a); see *infra* text accompanying notes 87-90.
8. See Walker, "Creating a Virtual Border: The Manifest Destiny of U.S. Border Security," *AILA 17th Annual California Chapters Handbook* 123 (2004); Paparelli & Tilner, "A Proposal for Legislation Establishing a System of Review of Visa Refusals in Selected Cases," 65 *Interpreter Releases* 1027 (Oct. 7, 1988); Wildes, "Consular Nonreviewability - A Reexamination," 64 *Interpreter Releases* 1012 (Sept. 4, 1987); Bernsen, "Consular Absolutism In Visa Cases," 63 *Interpreter Releases* 388 (May 2, 1986).
9. Minutes, AILA/VO Liaison Meeting (May 10, 1990), reported and reproduced in 67 *Interpreter Releases* 950, 967, 969-70 (Aug. 27, 1990).
10. U.S. Department of State, Foreign Affairs Manual (FAM). 22 CFR Parts 40 to 43 regulate State Department visa processing. The Visa Office, a division of the State Department's Bureau of Consular Affairs, publishes notes and procedural notes to those regulations in Volume 9 of the FAM. The FAM can be accessed online at <http://www.state.gov/m/a/dir/regs/>.
11. 9 FAM 40.4 N12.
12. Minutes, AILA/VO Liaison Meeting, Q.49 (Oct. 3, 1989), reproduced in 67 *Interpreter Releases* 1137 (Oct. 6, 1989).
13. Minutes, AILA/VO Liaison Meeting, Q.49 (Oct. 15, 2003), posted on AILA InfoNet at Doc. No. 03102043 (Oct. 20, 2003).
14. 9 FAM 40.4 N12.1.
15. 9 FAM 40.4 N12.2.
16. Interview with Cornelius D. Scully, III, former Director, Office of Legislation, Regulation and Advisory Assistance, Visa Office, U.S. Department of State, and Dean Dizikes, former Director, Office of Field Support and Liaison, Visa Office, U.S. Department of State (June 6, 1990). Regarding the Garrisi tape, see Paparelli, Pederson & Wolfsdorf, "Consular

- Processing of Nonimmigrant Visas: A Roundtable Discussion,” 90-9 *Immigration Briefings*, note 130 (Sept. 1990) (hereinafter NIV Roundtable). In 1997, AILA reported that the video had resurfaced as a training tool for consular personnel. In response, DOS ensured that the video would be universally withdrawn from any consular training program. See Minutes, AILA/VO Liaison Meeting, Attitudes Toward Attorneys/Right to Counsel, Q.2 (Nov. 17, 1997).
17. INA § 212(a)(6)(C)(i), 8 USCA § 1182(a)(6)(C)(i).
 18. 9 FAM 40.63 Notes.
 19. 9 FAM 40.21(a) Notes, 9 FAM 40.21(b) Notes.
 20. See, e.g., letter from H. Edward Odom, former Chief, Advisory Opinions Division, Visa Office, U.S. Department of State to J. Beck (Aug. 30, 1990), reported and reproduced in 67 *Interpreter Releases* 1164, 1168 (Oct. 15, 1990) (regarding the definition of a conviction in deferred adjudication cases).
 21. 9 FAM 40.4 N12.4.
 22. *Id.*
 23. Minutes, AILA Canada Chapter and Washington Chapter meeting with Vancouver NIV Chief Matthew Cottrell (February 29, 2008).
 24. J. Pederson, “The Fundamentals of Lawyering at Consular Posts,” *AILA’s The Visa Processing Guide, 2007-08 Ed.*
 25. INA § 212(b), 8 USCA § 1182(b); 22 CFR § 40.6; 22 CFR § 41.121; 22 CFR § 42.81; 9 FAM Notes and Procedural Notes to 22 CFR § 41.121; 9 FAM Notes and Procedural Notes to 22 CFR § 42.81.
 26. 9 FAM 41.121 PN1.2-1.
 27. 9 FAM 41.121 PN1.2-2.
 28. 9 FAM 41.121 PN1.2-4.
 29. 9 FAM 41.121 PN1.2-5.
 30. *Id.*
 31. 9 FAM 42.81 PN1.1.
 32. 9 FAM 42.81 PN1.3 and PN1.6.
 33. 9 FAM 41.121 PN1.1.
 34. INA § 221(g), 8 USCA § 1201(g).
 35. 9 FAM 41.121 PN1.3.
 36. *Id.*
 37. See NIV Roundtable, *supra* note 16, at 25 and n.150. See *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997) (mandamus jurisdiction when DOS declined to adjudicate immigrant visa petition for eight years).
 38. 9 FAM 41.121 PN2.
 39. 22 CFR § 41.121(b).
 40. 9 FAM 41.121 PN2.2. The reference to the quasi-refusal “entry” is with respect to the Department of State’s Consular Lookout and Support System (CLASS) computer system.
 41. See NIV Roundtable, *supra* note 16, at note 150.
 42. 9 FAM Appendix D, 200.
 43. Unclassified cable from Secretary of State to diplomatic and consular posts (Dec. 18, 1980) (copy on file with *Immigration Briefings*).
 44. Letter from Bill Frelick, U.S. Committee for Refugees, to the author (Mar. 19, 1989).
 45. End of an Era: Elimination of the “Application Received” Stamp During Visa Adjudications, State 004819 (Jan. 2007), posted on AILA InfoNet at Doc. No. 07050461 (May 4, 2007).
 46. 9 FAM 42.81 N4.1; 9 FAM 41.121 PN1.3.
 47. For a more detailed discussion about resubmitting visa applications, see NIV Roundtable, *supra* note 16, section “Overcoming Refusals at the Post of First Application.”
 48. *Id.*
 49. *Id.*
 50. *Id.*
 51. 22 CFR § 41.121(c), 42.81(c).
 52. 22 CFR § 41.121(c), 42.81(c). Note that the “reviewing officer” does not need to have a consular commission and title, particularly in small posts with single officer consular sections. See 9 FAM 41.121 PN1.2-7; AILA/VO Liaison Meeting Minutes, Q.22 (Oct. 11, 2006), posted on AILA InfoNet at Doc. No. 06101267 (Oct. 12, 2006).
 53. 9 FAM 41.121 PN1.2-7.
 54. 22 CFR § 41.121(c).
 55. 9 FAM 42.81 PN1.5.
 56. 22 CFR § 42.81.
 57. 9 FAM 41.121 PN1.2-7.
 58. Interviews with ex-Consuls and ex-Vice Consuls who choose to remain anonymous.
 59. See also NIV Roundtable, *supra* note 16, at 2 (describing the varieties of consular officers and consular posts) and note 123 and accompanying text (ACUS criticism of single-officer consular posts).
 60. 22 CFR § 42.121(c).
 61. 9 FAM 41.121 PN1.2-8.
 62. *Id.*

63. 9 FAM 42.81 PN2.
64. 22 CFR § 41.121(b).
65. 22 CFR § 41.121(b) (nonimmigrant cases), 42.81(b) (immigrant cases).
66. 9 FAM 40.4 N12.2.
67. INA § 222(f), 8 USCA § 1202(f). *See also* Minutes, AILA/VO Liaison Meeting, Q.12 (March 23, 2006) *posted* on AILA InfoNet at Doc. No. 06040664 (April 6, 2006).
68. 5 USCA § 552(b)(3); *Medina-Hincapie v. DOS*, 700 F.2d 737 (D.C. Cir. 1983); *DeLaurentiis v. Haig*, 686 F.2d 192 (3d Cir. 1982); *Church of Scientology of California v. DOS*, 493 F.Supp. 418 (D.D.C. 1980); *Jan-Xin Zang v. FBI*, 756 F.Supp. 705 (W.D.N.Y. 1991); 9 FAM 40.4 N4 and N5.
69. *Medina-Hincapie v. DOS*, 700 F.2d 737, 744 (D.C. Cir. 1983).
70. 9 FAM 40.4 N1-N11.
71. 5 USCA § 552(a).
72. 9 FAM 40.4 N3.1-1.
73. *Id.*
74. 9 FAM 40.4 N5.2, N5.3, and N5.4.
75. 9 FAM, note 5.4 to 22 CFR § 40.4.
76. INA § 221(g), 8 USCA § 1201(g).
77. 9 FAM 41.121 PN3.
78. This article does not address the elaborate Security Advisory Opinion (SAO) security check processes that are initiated by consular posts. DHS and DOS have established security-related SAO processing requirements to verify an applicant's background. For example, the "Visa Condor" check focuses on potential terrorism-related applicants, the "Visa Donkey" clearance is based on name "hits," and the "Visa Mantis" program is designed to ensure that sensitive technology is not stolen or inappropriately shared with others, in reliance of the Technology Alert List (TAL). For a more detailed discussion on these and other enhanced security-related requirements, *see* Secure Borders, Open Doors, *supra* note 2, pages 34-42. *See also*, Fischel, Ginsburg, Segal, Friedman, "NIV Consular Processing – Truth and Consequences," *AILA's The Visa Processing Guide, 2007-08 Ed.*, pages 27-29.
79. In October 2006, the Visa Office stated that it does not keep statistics on the number of advisory opinions it receives. *See* Minutes, AILA/VO Liaison Meeting, Q.3 (Oct. 11, 2006), *posted* on AILA InfoNet at Doc. No. 06101267 (Oct. 12, 2006).
80. Minutes, AILA/VO Liaison Meeting, Q.32 (Nov. 1, 2002), *posted* on AILA InfoNet at Doc. No. 02111231 (Nov. 12, 2002).
81. 9 FAM 40.6 N2.
82. Telephone interview with H. Edward Odom, former Chief, Advisory Opinions Div., Visa Office, U.S. Dep't of State (July 6, 1990).
83. *See* MOU, *supra* note 2.
84. *See* MOU, *supra* note 2, Section 4.
85. *Id.*
86. *Id.*
87. 22 CFR § 41.121(d).
88. INA § 104(a), 8 USCA § 1104(a) ("The Secretary of State shall be charged with the administration and the enforcement of the provisions of [the INA] and all other immigration and nationality laws relating to (1) the powers, duties and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusing of visas..."); *see also* INA § 221 to 222, 8 USCA § 1201 to 1202 (authority of consular officers to grant or refuse visas).
89. *Garcia v. Baker*, 765 F.Supp. 426 (N.D. Ill.1990).
90. *Id.* *See also* *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999) (affirming the doctrine of consular nonreviewability in an extensive opinion); *But see* *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1998) (mandamus action compelling consular officer to issue a decision on IV application).
91. Minutes, AILA/VO Liaison Meeting, CA/VO Organizational Chart, November 2007 (Oct. 24, 2007), *posted* on AILA InfoNet at Doc. No. 07101963 (October 19, 2007).
92. Child Status Protection Act of 2002, Pub. L. No. 107-208, 116 Stat. 927 (2002).
93. 9 FAM 40.21(a) PN1.
94. For a comprehensive list of mandatory advisory opinions, *see* R. Free and E. Poh, "Advisory Opinions from the Visa Office," *AILA's The Visa Processing Guide, 2008-2009 Ed.*
95. 9 FAM 40.63 N7.1.
96. *Matter of S- and B- C-*, 9 I&N Dec. 436, 1960 WL 12154, *Interim Decision* (BIA 1960).
97. *Id.* at 447.
98. 9 FAM 40.63 N6.3.
99. 9 FAM 40.63 N7.1(a).
100. *Id.*

101. 9 FAM 40.63 N7.1(b).
102. 9 FAM 40.63 N6.4(a).
103. *Id.*
104. 9 FAM 40.63 N7.1(a)(2).
105. 9 FAM 40.63 N9.3.
106. 9 FAM 40.63 N9.2.
107. INA § 212(a)(2); 8 USCA § 1182(a)(2).
108. 9 FAM 40.21(a) N3.4-2.
109. INA § 212(a)(2)(A)(i)(I); 8 USCA § 1182(a)(2)(A)(i)(I).
110. 9 FAM 40.21(a) N10.
111. *Id.*
112. *Id.*
113. *Id.*
114. 9 FAM 40.82 N6.
115. 9 FAM 42.43 N4.1.
116. 9 FAM 40.51 N10.4.
117. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).
118. *Lem Moon Sing v. U.S.*, 158 U.S. 538, 547 (1895), quoted with approval in *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).
119. *Centeno v. Shultz*, 817 F.2d 1212 (5th Cir. 1987), reported in 64 *Interpreter Releases* 853 (July 20, 1987), *cert. denied*, 484 U.S. 1005 (1988), reported in 65 *Interpreter Releases* 50 (1988).
120. *Balzac v. Puerto Rico*, 258 U.S. 298, 312 (1922)(Taft, C.J.).
121. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *U.S. ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (C.A.D.C 1929), *cert. denied*, 279 U.S. 868 (1929).
122. *Garcia v. Baker*, 765 F.Supp. 426 (N.D. Ill. 1990).
123. Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946)(codified as amended at 5 USCA § 551-706 and other scattered sections of 5 USC). APA § 10, 5 USCA § 701.
124. Complaint at 4, *Garcia v. Baker*, 765 F.Supp. 426 (N.D. Ill. 1990).
125. *Abourezk v. Reagan*, 592 F.Supp. 880 (D.D.C. 1984)(other citations omitted).
126. See former INA § 212(a)(27), 8 USCA § 1182(a)(27).
127. *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889)(cited by the court).
128. *Abourezk v. Reagan*, 592 F.Supp. 880, 883, (D.D.C. 1984).
129. *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982). *But see Burrafato v. Department of State*, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976) (no constitutional right of citizen spouse violated by denial of alien husband's application for immigrant visa abroad).
130. *Garcia v. Baker*, 765 F.Supp. 426, 429 (N.D. Ill. 1990).
131. *Id.*
132. *Burrafato v. Department of State*, 523 F.2d 554 (2d. Cir. 1975), *cert. denied*, 424 U.S. 910, 96 S.Ct. 1105, 47 L.Ed.2d 313 (1976).
133. See *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Allende v. Schultz*, 605 F.Supp. 1220 (D. Mass. 1985), *aff'd*, 845 F.2d 1111 (1st. Cir. 1988), reported in 65 *Interpreter Releases* 441 (Apr. 25, 1988).
134. *Shimizu v. Department of State*, No. CV 89-2741-WMB, unpublished (C.D. Cal. May 31, 1990), reported in 67 *Interpreter Releases* 699 (June 25, 1990).
135. *Wong v. Department of State*, 789 F.2d 1380 (9th Cir. 1986), reported in 63 *Interpreter Releases* 654 (Aug. 4, 1986).
136. *Knoetze v. U.S.*, 472 F.Supp. 201 (S.D. Fla. 1979), *aff'd*, 634 F.2d 207 (5th Cir. 1981), *cert. denied*, 454 U.S. 823 (1981).
137. *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997).
138. *Id.* at 930.
139. *Id.*
140. *Id.*
141. *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686 (2004).
142. *Id.* at 473-483, 2692-2698
143. *Id.* at 484, 2698.
144. http://travel.state.gov/visa/about/who/who_1462.html; http://travel.state.gov/visa/about/how/how_1463.html.
145. Department of State, Visa Services, "NIV Workload by Category FY-2007," http://travel.state.gov/visa/frvi/statistics/statistics_1476.html.
146. *Id.*
147. U.S. Constitutional Amendment V. The Fifth Amendment requires fundamental fairness and due process of law, and it may guarantee the right to counsel in administrative contexts where that right is not already guaranteed by statute. By contrast, the Sixth Amendment, which guarantees the right to counsel in criminal proceedings, ordinarily is not regarded as guaranteeing the right to counsel in administrative proceedings.

148. See 5 USCA § 500(b) (authorizing any lawyer in good standing to represent persons before federal agencies); APA § 6(a), 5 USCA § 555(b) (establishing the right to counsel for any person compelled to appear before a federal agency). See also APA § 2(a), 5 USCA § 551(1) (certain government bodies are specifically exempted from the APA, but not the State Department). Cf. *Koden v. U.S. Dep't of Justice*, 564 F.2d 228, 232 (7th Cir. 1977) (INS is a federal agency for APA purposes).
149. ABA Resolution, *supra* note 4.
150. Id.
151. Cf. APA § 10, 5 USCA § 702, § 704, § 706.
152. See generally Patrick and the Editors of Immigration Briefings, "Tell it to the Judge – Judicial Review of Immigration Decisions," 88-10 *Immigration Briefings* (Oct. 1988).
153. ACUS Recommendation, *supra* note 5; ABA Resolution, *supra* note 4.
154. See Ruthizer, "Administrative Appeals of Immigration Decisions: A Practitioner's Guide," 88-1 *Immigration Briefings* 10 (Jan. 1988); regarding the DOS Board of Appellate Review, see 22 CFR § 51.70, § 51.71.

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