

GOING GREEN - U.S. CONSULAR PROCESSING ENTERS THE ELECTRONIC PAPERLESS ERA IN 2008

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U.S. consular processing has undergone rapid and systemic changes during the past seven years, and the rate and scope of change does not appear to be slowing. Directly following 9/11, improving national security was at the forefront of the agenda. As a result, enhanced security checks and interagency data sharing—among a massive wave of other changes—made consular processing a daunting task that ensnared many unsuspecting visa applicants in problems and delays. Over the years that followed and after many growing pains, the system has begun to move toward streamlining visa processing procedures. In light of increasing familiarity and reliance on digital information systems, the new trend in consular processing is “going green,” eliminating paper applications altogether in favor of a fully electronic system. Although this system may provide opportunities for more efficient administration of visa processing, it will retain the same enhanced-security framework with more focus on internal agency data review and less applicant participation. As recent years have taught us, it is critical to understand upcoming systemic changes in attempt to anticipate and avoid pitfalls in U.S. consular processing. However, we can only hope that going paperless will benefit both the environment *and* visa applicants, and will not result in making an already complex system even more opaque and inaccessible.

In the aftermath of 9/11, U.S immigration authorities focused sharply on reforming the visa processing system to enhance security screening. Laws such as the USA PATRIOT Act of 2001, and the Enhanced Border Security and Visa Entry Reform and the Homeland Security Acts of 2002, mandated increased coordination of law enforcement and intelligence agencies, inter-agency data sharing, implementation of an integrated entry and exit control system, establishment of terrorist lookout committees, foreign student monitoring, biometric collection, mandatory interviews, and intensified security check measures. These procedures created a rigorous framework, making the U.S. consular application a daunting and intimidating exercise with myriad possibilities for complications and delays in visa issuance. Under this new system, the visa processing landscape was completely different—new additional security clearance procedures for nationals of certain countries, changes to the automatic revalidation provision, increasing applicability of the Technology Alert List (TAL), and a growing scrutiny of visa violations including overstays and unauthorized employment issues, as well as minor criminal convictions.

While many of these security measures were no surprise in light of political fallout after 9/11, the effects were devastating to many U.S. visa applicants. Applicants routinely encountered completely new and unpredictable surprises that triggered unexpected and lengthy delays in visa issuance. These delays and the resulting uncertainty in applicants and their sponsors adversely impacted critical U.S. economic sectors including business, trade, tourism, scientific research, academics, and entertainment.

Over time, however, new procedures have become more efficient as the enhanced-security system infrastructure has evolved. Numerous key programs have been implemented, such as the electronic Petition Information Management System (PIMS), facial recognition analysis from photographs, and digital 10-fingerprint capturing at consular interviews. This new comprehensive system has facilitated development of an interlocking network of data sharing between consular posts and the three branches of the Department of Homeland Security (DHS) that handle immigration matters: U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE).

As the U.S. consular processing system is adjusting to these changes, the framework appears to be shifting toward a more balanced approach. While the focus is still on security, there is a recognition of the need to balance national security interests with other strategic interests, such as promoting U.S. business, tourism, academic and scientific education and exchange, and the overall health of the economy. Increased coordination between government agencies has led to streamlined visa application procedures with less false hits and improved security check processing times. Effectively, this has not only resulted in increased efficiency, but it has also made consular processing somewhat more predictable to practitioners, visa applicants and employers. However, there is no doubt that the new system is more cumbersome, with visa issuance at most posts taking at least two to five days.

Yet even as the new consular processing system is becoming more comfortable and familiar, the U.S. Department of State (DOS) is on the verge of entering yet another new era. In light of a vastly expanded and improved infrastructure to share and store electronic data, DOS is piloting a new paperless system. This new scheme is built on the concept of Consular Application Centers utilizing a new all-electronic DS-160 Smart Form, E-signatures, maximizing inter-agency data sharing to adjudicate visa applications while minimizing the personal involvement of the applicant. The new Consular Application Center concept starts with an online application that simultaneously collects the fee, schedules a visa appointment, and most importantly, collects key data that allows the post to begin analyzing and processing the application before the interview date. The new DS-160 electronic application form combines the current DS-156, DS-157 and DS-158 forms. This lengthy form is currently being piloted in Nuevo Laredo and Monterrey,

Mexico. Both posts are also testing off-site biometric collection to facilitate processing of security checks.

This new paperless framework has much potential to improve consular processing. First, it could help in organization, setting the stage for an initial rules-based analysis of applications that could differentiate clearly approvable cases (including cases with prior visa issuance) from more complex cases. At least theoretically, this could allow DOS to better manage its caseload by streamlining approvable cases, which could reduce lengthy wait times at some posts. It might even be possible to begin allowing Personal Appearance Waivers (PAWs), perhaps initially for persons from countries with limited reciprocity schedules seeking visa re-issuance at home posts. Second, pre-appointment submission of application data and off-site biometrics collection could translate to less rigorous and shorter visa appointments for applicants. Third, the integration of improved data sharing into the application process could ease strict documentation requirements. For example, electronic verification of petition approval would ease the current heavy reliance on presentation of an original I-797 approval notice.

Nevertheless, despite these prospective benefits, another new framework for consular processing could also provide numerous challenges to practitioners and visa applicants. Only time will tell exactly what the problems will be, but some appear imminent. With increased reliance on electronic databases, what paper documents will remain relevant and routinely accepted in consular processing? How will applicants be able to challenge or overcome erroneous data that triggers undue problems in their cases? Will increased interagency data sharing hinder rather than streamline visa processing procedures?

The trend toward paperless information-sharing immigration systems is also being picked up by other government immigration agencies. CBP has recently unveiled a new “Electronic System for Travel Authorization” (ESTA), participation in which will be mandatory for Visa Waiver Program (VWP) visitors to the United States beginning in January 2009 (although a voluntary pilot program will begin on August 1, 2008). Similar to recent changes in consular processing, ESTA is designed primarily to enhance security screening pursuant to post-9/11 objectives, while secondarily streamlining immigration monitoring processing through interagency data sharing. Under ESTA, all nationals and citizens of VWP countries who seek to enter the United States for as visitors for temporary business or pleasure must acquire an electronic “approval” or clearance prior to boarding an air or sea carrier to the United States. Such clearance would be valid for multiple trips for two years or until expiration of the applicant’s current passport, whichever occurs earlier. ESTA application information—similar to that routinely elicited on Form I-94W—must be submitted via the Internet in English at least 72 hours prior to travel, and will result in a response of “Authorization Approved,” “Authorization Pending” (to be resolved within 72 hours of submission) or “Travel Not Authorized.” If travel is not authorized, the applicant must report to a U.S. Embassy or Consulate to apply for a visa. If approved, ESTA participants will no longer be required to fill out

Form I-94W upon entry to the United States, and this information will be electronically collected and integrated into agency databases.

ESTA's potential effects on the screening of VWP applicants for travel appear similar in many respects to the new paperless consular processing system. On one hand, streamlining information collection may improve CBP efficiency in reviewing admissibility of VWP visitors. On the other hand, however, a fully electronic screening system provides applicants and practitioners dangerously little room for advocacy and communication with immigration authorities. In fact, in the case of ESTA, the only point of redress for aggrieved applicants will be through DHS's Traveler Redress Inquiry Program (DHS-TRIP), a black-hole initiative that receives information from applicants but never issues any written responses whatsoever. Although ESTA applicants who are denied travel authorization may apply for visas through normal consular processing channels, it is unclear whether a visa interview under the new Consular Application Center regime will facilitate meaningful review of database errors.

In conclusion, security concerns continue to be at the forefront as the United States grapples with balancing legitimate international travel needs with the ever-present security risks facing the nation. While globalization has increased the frequency and necessity of travel to the United States by foreign nationals, the minefield of immigration practice is now complicated by the ever-growing complexity of consular practice. Knowledge of immigration petition filing procedures is not simply sufficient to ensure visa issuance at consular posts abroad any more. Effectively, immigration practice merely starts with the filing of a petition with USCIS and the issuance of an approval notice, and must properly finish with careful attention to detail at the consular processing stage. Although it is still unclear just how deep interagency databases will delve into each applicant's past, consular processing now requires a thorough analysis of an alien's entire employment and immigration history. The government now has access to far more data, which is actively shared and constantly integrated with other agencies. Attorneys and visa applicants are therefore advised to plan ahead, research the requirements of each consular post under the new systems, and be ready to present documentation and explanations regarding the purpose of both their current and past activities in the United States. And hope optimistically that the new electronic paperless era will bring more than environmental benefits.