

Consular Corner

August 2010

by: Liam Schwartz*



Embassy Abu Dhabi: A 3 FAM 1332 Operation

Congratulations to Embassy Abu Dhabi, the subject of one of the most glowing Office of the Inspector General (OIG) reports on consular operations in recent memory. <http://oig.state.gov/documents/organization/145650.pdf>

According to the OIG, the Mission Abu Dhabi's consular team enjoys "excellent morale" and is "performing admirably." The team is lead by a consular section chief who "regularly goes into the public waiting room to ensure that his clients understand that he cares about them." Moreover, the consular section proudly notes on its internal bulletin board that it is a "3 FAM 1332" operation.

What is [3 FAM 1332](#)? It is a policy that embodies the "Golden Rule" we were all brought up to believe in: Treat others as you would have them treat you. The text of the policy reads as follows:

"3 FAM 1332 POLICY

The treatment of our customers is an important aspect of how we are perceived as an agency. Because people will generally treat each other the way they are treated, good customer service must begin with the way we interact with each other. It is the policy of the Department that our employees must treat each other, as well as our external customers, with proper respect and courtesy at all times."

What has resulted from Abu Dhabi's proactive application of 3 FAM 1332? Only good things, according to the OIG:

"There is a palpable sense in Embassy Abu Dhabi's visa services section that treating everyone well pays dividends inside and outside the section."

Thank you, Embassy Abu Dhabi – you truly set the standard for others.

Is Pregnancy a Visa Ineligibility?

While possible changes to the 14th Amendment have been heatedly discussed in advance of the November elections, the Customs and Border Protection (CBP) has quietly posted an [updated policy statement](#) on the admission of pregnant women to the U.S.:

"Can I visit the U.S. while pregnant and what are the risks involved?"

Although there are no specific regulations prohibiting pregnant foreign nationals from entering the U.S., entry is allowed or denied at the discretion of the admitting U.S. Customs and Border Protection (CBP) Officer. If the CBP Officer determines that you are likely to become a ward of the government (meaning that the government must provide medical care because you do not have medical coverage while visiting the U.S.), you can be denied entry. When determining if you will be allowed to enter the U.S., CBP Officers take into consideration the date your child is due for delivery and the length of time you intend to stay in the U.S. In addition, they want evidence that you have sufficient medical insurance to cover any medical necessities while you are in the U.S. If it is determined that you do not have sufficient medical insurance to cover any unexpected or expected medical care while in the U.S., you can be denied entry. Additionally, if you are pregnant and entering the U.S. at a border port of entry via vehicle, be aware the radiation detection portals deployed at the ports do not emit any radiation, and do not present a hazard to you and your unborn child. Coming to the U.S. for the purpose of child birth is not a valid reason for travel."

With respect to the good people at CBP, the last sentence of the above statement is inaccurate under current law. Foreign nationals have an assortment of valid reasons for traveling to the US to give birth here, including family support and better medical care. Accordingly, tourist visa applications should not be denied under INA 214(b) based solely on the notion that giving birth to a child is an impermissible activity under the provisions of 9 FAM 41.31.

<http://www.state.gov/documents/organization/87206.pdf>

Nor should a tourist visa application be denied under INA 214(b) in the belief that an applicant's desire to give birth to a U.S. citizen makes her an intending immigrant. As noted by the State Department's Office of the Inspector General:

"The fact that such children might petition for immigrant status for the parent upon reaching 21, if they should choose to do so, if they are domiciled in the United States, and of the parent wants to immigrate, is so remote as to be, in nearly all cases, a non-starter."

<http://oig.state.gov/documents/organization/129778.pdf>

Until November has passed and calmer voices return, Embassy Paris's recommendation to AILA's Rome District Chapter seems the absolute best way to go:

"While it is clearly legal for a foreign national to give birth in the United States, COs [consular officers] are aware of widespread abuse of the U.S. Medicaid system by pregnant foreign nationals traveling on B1/B2 visas. Pregnant applicants are therefore advised to tell the CO of their intent. This is both an issue of credibility and a control that allows the CO to ensure that the applicant has the means to pay for the birth and has taken appropriate steps to arrange

for such payment, including any pre-natal and post-operative care required. The totality of circumstances are taken into account when applicants are pregnant and overall credibility is of primary concern to the CO."

Parenthetically, none of us should be shocked if the next revision to Form DS-160 includes a new pop-up box that asks female applicants, "Are you currently pregnant?"

Consular Court

Introduced in July's *Consular Corner* column, this feature allows you – the reader – to be a judge on immigration-related matters. After reading the outlines of the following real cases, determine for yourself how you think they should have been decided. The actual outcomes are provided later in the column.

Till Death Do Us Part (Part 1)

Does a foreign national cease being the son of a United States citizen after his mother's death?

Sponsored by his mother, Rolando Federiso, a Filipino national, applied for an immigrant visa in Manila. During the process, Federiso falsely indicated that he was unmarried. The visa was issued, but the lie eventually caught up with him, and fifteen years later Federiso found himself in removal proceedings for having misrepresented a material fact to the Immigrant Visa Consul in Manila.

Federiso sought relief under 8 U.S.C. § 1227(a)(1)(H)(i), which gives an immigration judge ("IJ") the discretion to waive the removal of immigrants who procured a visa through willful misrepresentation, provided that the immigrant is the spouse, parent, son or daughter of a United States citizen. The IJ ruled that this relief was unavailable because in the interim Federiso's mother had passed away; according to the IJ, 8 U.S.C. § 1227 was intended to benefit only the children of living U.S. citizens. Federiso then appealed the case in federal court.

What do you say – did the death of his mother mean that Federiso was no longer her son under 8 U.S.C.?

Till Death Do Us Part (Part 2)

Can a son still seek to "follow to join" his Legal Permanent Resident father if the father passes away before the immigrant visa process is completed?

Ian Ward, a British national, immigrated to the U.S. in the Multinational Executive/Manager category. Following his adjustment of status, Ian filed a Form I-824 on behalf of his minor son Gavin, who subsequently began the immigrant visa process in London. Ian died before this process could be completed, and Gavin was informed that he was no longer eligible to apply to immigrate as one

seeking to "follow to join" a lawful permanent resident parent. Gavin asked the court to extend a line of cases in which courts have allowed spouses to file for a visa after the qualifying spouse has died.

What do you think – if U.S. immigration law permits the surviving widow of a U.S. citizen to continue processing an immigrant visa application, shouldn't it also permit the surviving son of a legal permanent resident to complete the process?

Another Consular Miracle

Consular work is obviously a calling to miracles. Last month's column reported on a "Miracle on Martin Place" at the U.S. Consulate General in Sydney. This month we report on the sighting of yet another consular miracle, this time at the US Consulate in Johannesburg:

"At every stage of this process, we have literally witnessed miracles. *Miracles*. I do not use the word 'miracle' lightly. Sometimes when people use the word, they actually mean 'coincidence' or 'luck' – as in 'It was such a miracle that I got the parking space in front of the mall' or 'I got out of a speeding ticket, I'm so lucky.' These phrases are uttered flippantly and are *not* miracles.

The fact that I tucked my newly adopted son into his own bed tonight is a FREAKING MIRACLE, people.

Here's one story to prove it.

Toward the end of our month long stay in South Africa, we were feeling desperate. There's nothing quite like waiting aimlessly with three anxious children on documents in a foreign county with poor government infrastructure, that you *need* in order to go home. After repeated promises from our South African social worker that good news was on the horizon, we continued to hear nothing about the progress of our paperwork (new birth certificate and passport needed for US immigration), even though South African courts had already granted the adoption, for 24 long days. On Day 20, we decided to go to the US Consulate for emergency counsel. We knew that the Consulate had no control over the South African government's policies and processes but, we didn't know what else to do. I mean, when you're an American citizen and you're in trouble, you go the US Embassy, right?

We arrived at the US Consulate in Johannesburg on a Friday afternoon, all three kids in tow, looking wretched, and were able to speak with Someone In Charge. She was very sympathetic, took a surprising interest in our case and offered to 'make a few phone calls.' She was clear that she couldn't promise anything, that there wasn't any official channel through which she could help us obtain the necessary documents. But, she said she would review our file and see if there was anything she could do.

We left feeling encouraged, if only for the fact that someone in government was nice to us. I will never know what phone calls were made, or how this supervisor helped us behind the scenes. But, by Monday afternoon, we received word that all the documents we needed would be ready within a few days.

I have never felt so patriotic.

We wept with joy and relief and incredible gratitude and made our appointment for the final Visa interview. On the date, after 3 hours at the US Consulate, when all the documents had finally been turned in, the same Awesome Woman called our name and Mike and I approached the window.

She told us that Duzi's Visa had been officially approved, with a smile. We thanked her profusely, did a family celebration dance, and then Mike took the kids outside to play while I waited for the printed documents.

She called my name again and handed me the official sealed envelopes we needed to bring our son home to the United States and said something like, 'Congratulations. I'm very happy for your family. I must say, I took a special interest in your case because well, I'm adopted.'

We talked for a while longer (I was trying very hard to repress my sobby, hicuppy, ugly-cry voice) and, if there hadn't been a panel of bullet-proof glass separating us, I would have hugged her for a very long time. It probably would have been one of those long, socially awkward hugs."

<http://sunbreaksintherainycity.blogspot.com/2010/08/miracles.html>

Medical Grounds of Inadmissibility: Substantial Revisions

The Department has substantially rewritten the FAM provisions relating to physical or mental disorders as medical grounds of inadmissibility. These significant changes, set forth at 9 FAM 40.11 N11, focus on physical or mental disorders with harmful behavior, and on substance-related disorders, corresponding to INA 212(a)(1)(A)(iii) and (iv), respectively.

<http://www.state.gov/documents/organization/86936.pdf>

The following is a summary of these sweeping revisions.

Introduction

As before, the mere presence of a physical or mental disorder does not by itself render a visa applicant inadmissible to the United States under 212(a)(1)(A)(iii). The trigger to inadmissibility is the presence of associated harmful behavior.

Key Concepts of Mental Health

In this new section, the Department defines the key concepts of physical and mental health disorders:

A "**physical disorder**" is a clinically diagnosed medical condition where the focus of attention is physical manifestations.

A "**mental disorder**" is a health condition characterized by alterations in thinking, mood or behavior.

"**Harmful behavior**" is an action associated with a physical or mental disorder that causes (or has caused) one or more of the following:

1. Serious injury (psychological or physical) to the foreign national or others. An example of harmful behavior to the foreign national is attempted suicide; an example of harmful behavior to others is pedophilia.
2. A serious threat to the health or safety of the foreign national or others. An example of a serious threat to both the foreign national and to others is driving while intoxicated.
3. Major property damage.

NOTE: The Department emphasizes the following principle: Only harmful behavior that is associated with a physical or mental disorder is relevant for the purpose of determining a medical inadmissibility.

A **Substance-related disorder** can involve one of the following:

1. Substance dependence – compulsive long-term use of alcohol or other psychoactive substance despite significant problems (physical, social and others).
2. Substance abuse – a pattern of recurrent use of alcohol or other psychoactive substance despite adverse consequences or impairment.

Remission in the context of mental or substance-related disorders is defined as "a period of at least 12 months during which no substance use or associated harmful behavior have occurred."

Class "A" medical conditions are those which render a visa applicant ineligible for a visa.

Class "B" medical conditions do not render a visa applicant ineligible for a visa, even though the applicant has a disease, disability or abnormality amounting to a substantial departure from well-being.

Alcohol Abuse or Dependence

The FAM changes stress that alcohol abuse or alcohol dependence constitutes a medical condition which can lead to inadmissibility. That said, a panel physician's diagnosis of alcohol abuse or dependence alone does not make an applicant ineligible to receive a visa unless there is evidence of associated harmful behavior which has, or is likely to pose a threat to the property, safety or welfare of the foreign national or others.

Consular officers are instructed to refer nonimmigrant and immigrant visa applicants to panel physicians if the applicant has a single alcohol-related arrest or conviction within the past five years, or if the applicant has two or more such arrests or convictions within the past decade. Officers should also refer applicants to panel physicians if, in the absence of DUI arrests or convictions, there is any other evidence to suggest that the visa applicant has an alcohol problem.

Role of the Panel Physician

Panel physicians have a central role in evaluating the existence of a physical or mental disorder or a substance-related disorder that would render an applicant ineligible for a visa. In performing a medical examination, the panel physician is responsible (*inter alia*) for identifying and diagnosing physical or mental disorders (including alcohol-related disorders); identifying harmful behavior associated with a disorder; and determining the remission status of any previously diagnosed disorder.

Class "A" or Class "B" Medical Conditions

Panel physicians may make the following diagnoses with regard to applicants referred for examination:

Class "A": The applicant has a physical or mental disorder with associated harmful behavior.

Class "A": The applicant has a disorder characterized by substance abuse or dependence.

Class "B": The applicant has a physical or mental disorder with no associated harmful behavior.

Class "B": The applicant has a history of a physical or mental disorder with associated harmful behavior which is unlikely to recur.

Class "B" – The applicant's substance abuse or dependence is in full remission.

Neither "A" nor "B": The applicant has not been diagnosed as having a physical or mental disorder or a substance-related disorder.

Waivers for Immigrant Visa Applicants

An immigrant visa applicant who is determined to have a communicable disease of public health significance may be eligible for a waiver of the inadmissibility set forth in INA 212(a)(1)(A)(i).

An immigrant visa applicant who objects on religious or moral grounds to receiving required vaccinations against vaccine-preventable diseases may be eligible for a waiver of the inadmissibility set forth in INA 212(a)(1)(A)(ii).

An immigrant visa applicant who is determined to have a physical or mental disorder with associated harmful behavior may be eligible for a waiver of the inadmissibility set forth in INA 212(a)(1)(A)(iii).

An immigrant visa applicant diagnosed with substance abuse or addiction is **not** eligible for waiver relief of the inadmissibility set forth in INA 212(a)(1)(A)(iv).

Waivers for Nonimmigrant Visa Applicants

Consular officers may recommend waivers per 212(d)(3)(A) for any of the medical-related grounds of inadmissibility set forth in 212(a)(1)(A).

Consular Court - Decisions

Till Death Do Us Part (Part 1)

[The 9th Circuit held](#) that Federiso remained his mother's son even after death. Indeed, the court strongly criticized the IJ's interpretation of the phrase "spouse, parent, son, or daughter of a citizen of the United States" to mean the qualifying relative of a *living* citizen of the United States:

"This is not what the statute says. It is not the role of those who enforce and interpret immigration law to impose unilaterally novel substantive requirements beyond those set forth in the immigration law itself."

The case was remanded to the IJ for consideration of the request for relief from removal.

Till Death Do Us Part (Part 2)

[The 11th Circuit ruled](#) against Gavin, in a decision which set forth this harsh truth:

"Spouses and former spouses of U.S. citizens have long been treated more favorably than derivative beneficiaries of lawful permanent residents."

In so doing, the court upheld the position of the defendants (who included the Department of State's Visa Office): If the principal has died or lost status, there is no longer a basis to following to join.

Those interested in refreshing their memories with regard to eligibility for "following to join" status should start with [9 FAM 40.1 N7](#) ("Basis for Following to Join").

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

In addition to the sweeping redrafting of many of the medical grounds of inadmissibility discussed above, other statutory grounds of inadmissibility have been the focus of substantive updates to 9 FAM (Visas) of the Foreign Affairs Manual (FAM) this month. A summary of these updates and other recent changes to 9 FAM is offered below.

[Crimes Involving Moral Turpitude](#) (9 FAM 40.21(a))

Revisions to 9 FAM emphasize the distinct definitions of the terms "crime" and "moral turpitude" in the phrase "crime involving moral turpitude" (CIMT). Per the FAM, an individual may be found inadmissible under the CIMT provisions only if the acts in question constitute a "crime" under the criminal law of the jurisdiction where they occurred. Once this determination has been made, the consular officer's decision on whether the acts constitute a crime involving "moral turpitude" is to be based on the moral standards generally prevailing in the United States.

[Immigrant Investors](#) (9 FAM 42.32(e))

The FAM provisions relating to eligibility for the Fifth Preference (Employment Creation) immigrant category have been updated to note that the expiration date of the Immigrant Investor Pilot Program is now September 30, 2012.

[International Child Abduction](#) (9 FAM 40.103)

One of the legal tools used in combating the abduction of children from the United States by foreign national parents is INA 212(a)(10)(C). The latter provision renders inadmissible a foreign national who is withholding custody of a child outside United States from the custodial parent. An update to the pertinent FAM regulation clarifies that the inadmissibility applies not only to the foreign national parent withholding custody, but also to the following individuals:

1. A foreign national who supports the child abductor;
2. A foreign national who is a relative of the child abductor.

Parenthetically, #2 above presumably is meant to refer to relatives with whom an abducted child is residing abroad. But as the text is drafted, it would extend the inadmissibility to any relative of a child abductor, something which on its face is overly broad and legally unenforceable.

[Security and Related Grounds of Inadmissibility](#)

Torture or Extrajudicial Killings (9 FAM 40.35(c))

A new subchapter involving the commission of acts of torture or extrajudicial killings has been added to the FAM provisions dealing with security and related grounds of inadmissibility. Per this new subchapter, an individual who, while outside the U.S., participates in the commission of an act of torture or an extrajudicial killing is inadmissible.

[Association with Terrorists](#) (9 FAM 40.32 Regs/Statutes)

The terrorist-related provisions of 9 FAM 40.32 have been supplemented by the addition of reference to the sweeping provisions of INA 212(a)(3)(F):

"Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible."

[Visa Waiver Countries](#) (9 FAM 41.2 Exhibit II)

The list of countries participating in the Visa Waiver program has been updated to include Greece.

Are You Smarter Than A Consular Officer?

1. How many references are there to God in 9 FAM?
2. The FAM urges consular officers to be "flexible and fair" in adjudicating applications involving which specific visa category?
3. True or false: A child born during an LPR mother's temporary visit abroad may be admitted to the US without an immigrant visa if the admission is within two years of birth - but only if accompanied by his mother, who is making her first return to the US after the birth of the child.
4. The US Consul General, William Martin, recently reaffirmed US support to Balochistan, a region over which his post has consular jurisdiction; to which country is Mr. Martin assigned?

5. True or false: A person born in Puerto Rico acquires U.S. citizenship in the same way as one born in any of the 50 States.
6. True or false: An accompanying spouse is inadmissible to the U.S. as a new immigrant if the principal alien has not yet been admitted to the US.
7. True or false: A U.S. citizen aged 15 years who is renewing her American passport does not need to present her birth certificate; her expired passport is sufficient proof of her entitlement to a new passport.
8. Where did the U.S. place on *Newsweek's* list of the World's Best Countries?
9. May a consular officer accept an NIV application from an individual who is not physically present in the consular district?
10. Who was the first African American and first woman to serve as Assistant Secretary of State? (Hint: The Award for Consular Excellence bears her name.)

Top Ten Visa Wait Times at U.S. Consular Posts, August 2010*

Embassy Rio de Janeiro (#6 on this month's Top Ten list) is countering a recent spike in wait times by offering a new program, [Business Program Plus \(BPP\)](#). Under this program, qualifying business travelers who are resident within Rio's five-state consular district may come to the consular section any weekday at 1 pm to submit their application to renew their business visa, without having to make an appointment.

| # | Country | Consular Post | Visa Wait Time | Increase/decrease from Last Month | Top 10 Position Last Month |
|---------|-----------|-------------------------------|----------------|-----------------------------------|----------------------------|
| 1 | Cuba | Havana (US Interests Section) | 999 days | Unchanged | 1 |
| 2 | Venezuela | Caracas | 172 days | Unchanged | 2 |
| 3 | Nigeria | Lagos | 68 days | -3 days | 3 |
| 4 | Mexico | Guadalajara | 63 days | Unchanged | 5 |
| 5 (tie) | Nigeria | Abuja | 60 days | + 31 days | New Listing |

| | | | | | |
|---------|----------|----------------|---------|-----------|-------------|
| 5 (tie) | Uganda | Kampala | 60 days | Unchanged | 6 |
| 6 | Brazil | Rio de Janeiro | 57 days | + 35 days | New Listing |
| 7 | China | Shanghai | 56 days | - 12 days | 4 |
| 8 (tie) | Columbia | Bogota | 53 days | + 24 days | New Listing |
| 8 (tie) | Ecuador | Quito | 53 days | + 1 day | 8 (tie) |
| 9 | Egypt | Cairo | 52 days | - 4 days | 7 |
| 10 | Brazil | Sao Paulo | 51 days | + 14 days | New Listing |

** Updated to August 3, 2010 and based on published Department of State data. The "visa wait time" is the estimated time in which individuals need to wait to obtain a nonimmigrant visa interview appointment at a given consular post.

Top Wait Times by Region:

| | | |
|--------------------------------------|----------------------|------------|
| The Americas (excluding Cuba) | Venezuela/Caracas | (172 days) |
| Africa | Nigeria/Lagos | (68 days) |
| East Asia and Pacific | China/ Shanghai | (56 days) |
| Middle East and North Africa | Egypt/Cairo | (52 days) |
| Europe and Eurasia | Montenegro/Podgorica | (30 days) |
| Central and South Asia | India/Kolkata | (28 days) |

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

- (1) One. 42.67 PN2
- (2) The E visa category. 9 FAM 41.51 N1
- (3) False – the trip may also be an accompanying father's first return to the US after the birth of the child. 9 FAM 42.1 N1.1
- (4) Pakistan
- (5) True. 7 FAM 1122

(6) True. Chapter 14.3 of CBP Manual

(7) False. Until reaching age 16, U.S. citizens must submit their birth certificate (or CRBA) in order to document their relationship to their parents, who must also appear in person (or submit a notarized statement of consent).

(8) #11. <http://www.newsweek.com/2010/08/15/interactive-infographic-of-the-worlds-best-countries.html>

(9) Yes, as long as the individual resides in the consular district (9 FAM 41/101 N2.1)

(10) Barbara M. Watson http://en.wikipedia.org/wiki/Barbara_M._Watson

Quote of the Corner

"Visa services are often perceived as adversarial both inside and outside of the consular section: someone wins and someone loses. The very act of refusing a visa is demeaning and insulting to many applicants. The manner in which consular clients perceive their treatment in the section is often critical to their perception of America."

U.S. Department of State, Office of the Inspector General, Report of Inspection, Embassy Abu Dhabi

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

All rights reserved to the author.