

Memorandum

TO: Employees Traveling Internationally
FROM: Seyfarth Shaw Business Immigration Group
RE: Important Information for Foreign Nationals Traveling Internationally

This Memorandum provides an outline of current U.S. visa issuance practices and details troubling recent developments that should serve as a caution to travelers. *Please review this memo carefully before planning any international travel.* (Note that Canadian citizens are not required to obtain a U.S. visa stamp as a prerequisite to entering the U.S.; thus, this memo does not apply to Canadians.)

I. GENERAL TRAVEL GUIDELINES

Foreign national applicants should anticipate complex and time-consuming visa application procedures at U.S. consular posts, including mandatory personal interviews as well as the possibility of extended delays. Applicants should anticipate comprehensive questioning by immigration officials when seeking to re-enter the U.S. Certain individuals who are nationals or citizens of various designated countries or who have recently traveled to those countries (Iran, Iraq, Cuba, Sudan, or Syria) will be subjected to more heightened security screening. For full details on the most up-to-date procedures and requirements, please visit www.immstar.com and click on *Immigration Memoranda* to view a number of memoranda addressing these issues.

II. PASSPORT AND VISA VALIDITY

Before traveling internationally, foreign nationals should verify that their passports and visas are valid for re-entry into the U.S. Foreign nationals who are exempt from the visa requirement who intend to enter the U.S. pursuant to the Visa Waiver Program should determine whether they must obtain advance permission to re-enter (as discussed below).

A. Passport Validity

As a rule, a foreign passport must be valid for a period of at least six (6) months beyond the date of intended departure from the U.S. There are some exceptions to this rule. Under international treaties, some countries have an agreement with the U.S. whereby a passport is deemed valid for six (6) months beyond its expiration date to allow admission. However, the Form I-94 will *usually not* reflect this additional time period.

Canadian citizens must possess a valid passport to enter the U.S. when traveling by air. When traveling by land or sea, however, Canadian citizens do not require a valid passport but rather may present a government-issued photo ID, such as a driver's license, along with proof of citizenship, such as a birth certificate or naturalization certificate.

B. The Visa Waiver Program and the ESTA System

Citizens of the so-called "Visa Waiver Program" ("VWP") countries may enter the U.S. for general business or tourist purposes for a maximum of 90 days without presenting an actual B-1/B-2 visa stamp upon entry. The included countries are: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom.

All nationals and citizens of VWP countries must obtain travel authorization *prior* to seeking entry to the U.S. under the VWP. This authorization is obtained online through the Electronic System for Travel Authorization ("ESTA"), an Internet application administered by the Department of Homeland Security ("DHS"). The website address is <https://esta.cbp.dhs.gov>. The on-line system requests information similar to the Form I-94W, Arrival Departure Record that VWP travelers complete on-board their flight before entering the U.S. A registration fee of \$14 payable by credit or debit card is required for new or renewed ESTA. *Once approved, authorizations are generally valid for multiple entries into the U.S. for up to two years or until the applicant's passport expires or other specific circumstances arise requiring renewal.*

Please note that individuals with a record of prior arrests or convictions are not eligible to use the ESTA program and instead will be required to obtain a B-1/B-2 visa stamp.

C. Visa Validity

For a foreign national to enter the U.S., the visa stamp in his/her passport must reflect the nonimmigrant visa status the foreign national seeks; the visa must be unexpired, and, if the visa allows for a limited number of entries, it must have at least one remaining entry available on the intended date of re-entry to the U.S. In addition, a foreign national who is the beneficiary of any petition-based visa, such as an H-1B or L-1A/L-1B, must travel with the original Form I-797, Notice of Action issued by United States Citizenship and Immigration Services ("USCIS"). If the foreign national does not possess a valid visa stamp, he/she must make arrangements to obtain the appropriate visa before returning to the U.S. The options for processing a visa stamp include:

- Application in the foreign national's home country; and,
- Application in a country other than the home country as a "third country national" ("TCN").

Eligibility for these visa stamping options is contingent upon many factors. For full details on these programs as well as related procedures and requirements, please visit www.immstar.com and click on *Immigration Memoranda* to view the document entitled “General Information on Obtaining a Nonimmigrant Visa Stamp.”

III. VISA ISSUANCE PROCEDURES: INTERVIEWS, SECURITY CHECKS AND POTENTIAL DELAYS

A. Visa Issuance Delays

Foreign nationals traveling outside of the U.S. who intend to apply for a visa at a U.S. consulate or embassy (“consular post”) should note a number of U.S. Department of State (“DOS”) security procedures which now affect processing times.

When all goes smoothly, visa issuance typically takes three (3) to six (6) business days, but may take as long as six (6) to eight (8) weeks. Unfortunately, we can no longer rely on everything to go smoothly. In fact, there are a number of reasons why consular posts are now delaying visa applicants, and these are outlined in Section IV below. As a preliminary caution, we recommend that you consult the website of the relevant consular post(s) for the full range of information prior to making any travel arrangements or reserving the appointment. Consular contact post information is available at <http://www.usembassy.gov>.

B. The DS-160 Visa Application

The DOS is now requiring Form DS-160, which is completed online and requires uploading of the applicant’s photograph. See: http://www.travel.state.gov/visa/forms/forms_4230.html. The technology supporting this visa application is very sensitive and can “time out” quickly. For this reason, applicants should save frequently while completing the form. *Upon completion, the confirmation sheet (which will generate a bar code) should be printed as it is required for admission to the consular post for the visa interview.* For more detailed information on completion of the Form DS-160, please visit www.immstar.com and click on *Immigration Memoranda* to view the document entitled “How to Complete the Form DS-160.”

C. Personal Interview Requirement

A foreign national will be required to appear for a personal interview. With limited exceptions for applicants aged under 14 and over 79, the DOS requires a personal appearance for consular interviews. The interview guidelines often create processing delays and changes in procedure at consular posts, especially during the busy Christmas/New Year’s holiday season and also during the mid-to-late summer months. *Therefore, a foreign national should contact the consular post at which he or she will apply for a nonimmigrant visa to obtain the latest information.*

D. General Guidelines- - what to consider before walking into the visa interview

Please keep the following guidelines in mind:

- *Dress for success:* Consular officers formulate judgments about the credibility of an applicant in a very short period of time. For this reason, we strongly suggest that visa applicants dress for the visa interview as they might dress for an important business meeting. Please do not wear casual or “sporty” clothing, including clothing bearing written slogans, large logos, or insignias. For men, this means wearing a suit and tie (or, at the very least, dress trousers and a dress shirt) and avoiding shorts, sneakers, and sandals. For women, this means a dress, pants suit, or suit jacket with a skirt. Women should also avoid wearing shorts, sneakers, or sandals.
- *Be psychologically prepared* to walk past large, gun-toting security personnel at the entrance to the consular post building. Please allow extra time to get to the appointment. If you are not familiar with the neighborhood where the post is located, do a “dry run” to ensure that you know how to access local parking, public transport, or other relevant landmarks. Also, please note that you will likely be standing during the interview and speaking with the consular officer through thick, bullet-proof glass.
- *Keep yourself engaged and amused:* Because many consular posts discourage or even disallow the use of mobile phones or hand-held devices in the actual interviewing area, you are advised to bring reading material in preparation for what may be long waiting times.
- *Don’t take it personally:* More often than not, consular officers are overworked and under stress. While this is not a defense against the ungracious attitude some consular officers project, it is a reminder not to take it personally if your presiding officer is not “warm and fuzzy” in his/her approach. Do not interrupt the consular officer, and let yourself be comfortable with what may seem like long periods of silence while the officer is reviewing your file. Remain calm, patient, and professional, and focus on providing direct answers, in English, to the consul’s questions. Your positive, professional, and patient attitude can make a difference in the dynamics of the interview -- and possibly the outcome.
- *Know your file* by reviewing any written materials about the company, job description, and other details in advance.
- *Bring an employment confirmation letter.* Get a letter from your sponsoring organization verifying your job title and salary and ongoing employment.

IV. REASONS VISA APPLICANTS MAY BE DELAYED ABROAD IN CONNECTION WITH VISA STAMPING APPLICATIONS

A. The Possibility of Processing Delays and an Extended Wait Abroad

Following the personal interview, the applicant may be told that his or her application is being chosen for “additional processing.” There are a variety of reasons why the DOS may choose to require additional processing, and those reasons are listed below. In connection with each reason we will provide a “Practice Tip” suggesting ways the applicant may best prepare.

In the recent past we have also seen a dramatic increase in the number of males of Indian and Pakistani nationality who have been subjected to extended delays in their home country or a third country following their visa stamping interviews. Before employees plan international travel they should first consider the risk that they may experience job-threatening delays outside the U.S. Moreover, if the employee chooses to apply at a “Third Country Post” (that is, in a country where the applicant is neither a citizen nor a resident), he/she stands to be detained in a place where there exists no support network of family or friends and where the applicant may be required to pay for many nights of hotel accommodation.

Thus, employers and employees should be aware of these risks. In some cases, an individual and or family members may elect to forego international travel rather than be detained outside the U.S. Employees are strongly advised to consult with company representatives and direct managers to discuss the possibility of working remotely during an extended delay outside the U.S.

B. Common Reasons for Delayed Visa Processing

- (1) **PROBLEM: Concern based on applicant’s nationality or travel to certain countries:** Special scrutiny is imposed on male visa applicants of “solider age” between the ages of 16 and 45 who were born in or are nationals or citizens of certain countries. Though the DOS has declined to release the list of countries on national security grounds, it is believed to include Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen. In addition, nationals or citizens of Cuba and North Korea -- countries the U.S. has long identified as sponsors of terrorism -- are also subject to increased scrutiny. DOS requires visa applicants to provide extensive background information which, in and of itself, may trigger more intensive security clearances. Such information relates to foreign travel history, education, military service, weapons and combat training, and other details. In addition, consular officials may request resumes, publications, and academic transcripts to confirm information found on the Form DS-160.

PRACTICE TIP: Applicants should be made aware of the fact that, in situations where an individual is a national of one of the above countries or whose passport indicates travel to one or more of these countries, there is a strong likelihood of delay.

- (2) **PROBLEM: “Name Hit”:** This is when, in the course of the initial security check, there is a “hit” on the applicant’s name. This is a situation where there is a person somewhere in the world who has the same name as the applicant’s and who has a criminal record that shows up as part of the FBI check. In the case of a

“name hit,” it takes additional time for the DOS to research whether the convicted individual is the same person as the applicant. Such delays can often be resolved in a period of 2 weeks, but in some cases they may take considerably longer to resolve. Name hits are a greater risk in cases where an applicant has a common first or second name.

PRACTICE TIP: Applicants should be made aware of the fact that, in situations where an individual has a common name (e.g., Juan Garcia, Raj Singh, John Johnson) there exists a far greater likelihood of a name hit.

- (3) **PROBLEM: TAL List Issue:** This is where there is a belief by the consular officer that the applicant is engaged in a “dual use” activity that could be harmful to U.S. security or which is noted on the DOS’s “Technology Alert List.” If a foreign national works in high technology, engineering, or the sciences, he or she should be prepared to be questioned closely about the details of his/her job. This is also true if the individual works with products or services that have both commercial and military applications (“dual use” technologies). Visa delays may result as consular officers seek security-related advisory opinions from federal agencies on a foreign national's work background. If an export control license is required for the position, the foreign national must ensure that job activities are within the terms of the license and that the employer can document compliance with the license. For a more detailed discussion on the types of technology and expertise which may trigger an enhanced security clearance, please visit www.immstar.com and click on *Immigration Memoranda* to view the document entitled “Technology Alert List.”

PRACTICE TIP: Applicants should obtain a Technology Alert List letter signed by an HR professional or manager of the sponsoring organization. This letter will discuss the employee’s specific role within the organization and explain that the applicant is not involved in any “Dual Use” activities that would compromise U.S. security.

- (4) **PROBLEM: Specific Issues with IT and Consulting Professionals:** Be aware of the fact that the IT, staffing, and consulting industries are under particular scrutiny at present. There is a perception among many DOS and USCIS officers that not all work sites are disclosed in the H-1B petition or covered by appropriately filed LCAs. Similarly, there is a perception among many consular officers that the knowledge of many L-1B employees or visa applicants is not truly “specialized.” In addition, there is a widespread concern that consultants and other professionals who are assigned to third-party or client worksites may not be working under the direct supervision of the company that actually sponsored the visa. **As a result, there has been a dramatic increase in the number of significant delays at consular posts, particular involving applicants who are Indian or Pakistani nationals.** The recent U.S. government investigation of the IT consulting company Infosys for alleged widespread immigration violations has contributed to this perception. At present, approximately one in every three applicants is experiencing delay for some period of time (ranging from a week or two up to several months).

Administrative processing involves extensive background security checks that are conducted on the visa applicant while the individual waits for the consular post to complete adjudication. As this situation has the potential of significantly lengthening an employee's stay abroad and delaying his/her return to the U.S., all potential applicants are cautioned about the current climate before departing.

PRACTICE TIP: Applicants should be prepared to present a letter from the actual "sponsoring" employer or petitioner detailing all work sites and explaining the nature of the direct employment, and how the applicant is supervised and evaluated directly by the sponsoring or petitioning organization (and not the end client). Some applicants may find a lower level of scrutiny at posts in Canada than at posts located in India; however, we caution such applicants that they could still be delayed abroad for a significant period of time. *We advise such applicants to choose the Canadian option only if the applicant has a friend, relative, or support group making it possible to stay in Canada for many weeks at a time in the event of a delay.* The other issue is that the applicant's Canadian visa status may expire while he or she is awaiting adjudication of the visa.

- (5) **PROBLEM: Section 221(g) Delay:** Section 221(g) is a rather broad-ranging provision of the law which allows the consular officer to deny or delay the issuance of a visa when "the consular officer knows or has reason to believe that such alien is ineligible to receive a visa." In conjunction with a 221(g) request, the consular officer may ask for extensive and burdensome documentation from the sponsoring organization such as employee lists, social security information, tax filings, business plans, and other documentation. *Please note that since early 2011 we have noted a marked increase in the issuance of 221(g) notices, particularly for male Indian and Pakistani nationals of "solider age" (age 18 to 45)*

While awaiting resolution of a Section 221(g) delay, most applicants will find that they are unable to travel internationally because the consular post actually retains the passport and will hold onto the applicant's passport until the application is either approved or withdrawn. However, many consular posts will return the passport during a security check issue or 221(g) delay. *If it is the policy of a chosen consular post to hold onto the applicant's passport during the pendency of the application, please note that this could result in being "stranded" in the country where the post is located..*

PRACTICE TIP: Male nationals of India and Pakistan are particularly cautioned as to the possibility of a delay based on a 221(g) request. The best approach here is to seriously weigh the need to travel, to alert the manager and company of a potential extended delay, to bring all necessary documentation to the interview, and to prepare as thoroughly as possible.

- (6) **PROBLEM: Appearance in National Security and Law Enforcement Databases**

Consular officers are required to screen visa applicants through the State Department's security databases and lookout lists, which contain the names of individuals identified as security risks. A positive "hit" on one of these lists will trigger additional security clearances and may cause the consular officer to seek guidance from State Department headquarters on the further handling of the case; as a result, visas may be delayed or refused.

PRACTICE TIP: Unfortunately, there is no way to know in advance as to whether an applicant appears in such a list. Due to security reasons the U.S. government will not disclose the names of individuals who may appear on such a list.

C. What Happens in the event of a delay?

In most of these situations, consular posts will retain the application and the applicant's passport until the matter is resolved (or until the application is withdrawn). The request for an additional, more comprehensive security clearance can create delays and the applicant may be "stranded" in that country without a passport or the ability to travel internationally. *An extended delay could also place the employee's job in jeopardy, as the employer may need to replace the employee in order to meet a business need.*

V. CONCLUSION

Proper planning prior to undertaking international travel is always important. In the current political climate, however, such planning is absolutely critical. In some cases employees (in consultation with their managers and HR) will need to weigh the risks before determining whether to travel internationally, and some employees will opt to forego international travel rather than risk delays, possible job loss, or failure to perform the duties of the position. We urge you to contact us to discuss travel plans for yourself or your employees who are uncertain of visa and/or entry requirements or who have special travel needs.

If you should have any questions about traveling internationally, please reach out to your immigration contact person at Seyfarth Shaw LLP. We will be happy to address your questions.