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US IMMIGRATION & NATIONALITY LAW

STUDENTS AND IMMIGRANT INTENT

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As prospective students to the US are thinking of applying for a student visa at an overseas US consulate, it is important to take note of a helpful Department of State advisory that was sent to consulate posts worldwide, *Students and Immigrant Intent,* Cable, DOS, 05-State-180015 (Sept. 28, 2005) ("DOS Advisory"). The DOS Advisory, which eases the standards for assessing a student's intent, can be found at http://travel.state.gov/visa/laws/telegrams/telegrams_2734.html.

Generally, an individual applying for a nonimmigrant visa is presumed to be an intending immigrant under Section 214(b) of the Immigration and Nationality Act unless s/he establishes to the satisfaction of the consular officer that s/he is entitled to the appropriate nonimmigrant status. As a result of Section 214(b), many nonimmigrant visa applicants are refused the visa on the ground that they have not successfully rebutted the presumption of being intending immigrants. Note that a consul has unfettered discretion to determine whether an applicant has been able to overcome this presumption. On the other hand, the immigrant intent requirement applies only to certain nonimmigrant visa classifications. For example, immigrant intent is irrelevant for H-1B, L or V visa classifications, and these exceptions have been carved out in Section 214(b) itself. On the other hand, rebutting the presumption of immigrant intent by establishing a residence abroad is essential for the B, F, J, O-2, P and Q visa classifications.

The DOS Advisory is an extremely useful guide for individuals applying for a student visas (the F-1, J-1 or M-1) at an overseas US consulate in the home country. The DOS Advisory, most importantly, instructs consular officers that

the student visa applicant's intent must be "adjudicated based on present intent ‰ÞIT not on contingencies of what might happen in the future, during a lengthy period of study in the US." The DOS Advisory recognizes that students may typically stay in the US longer than many other nonimmigrant visas, and this factor renders it more complex for a consul to make an assessment of the student visa applicant's future intent.

The DOS Advisory also notes that while the concept of "ties" is very useful in evaluating many nonimmigrant visa applications, it is relatively less useful in assessing the present intent of a student. The following extract from the DOS Advisory, in Paragraph 4, is worth noting:

> "The typical student is young, without employment, without family dependents, and without substantial personal assets. Students may have only general rather than specific plans for the future. These personal circumstances differ greatly from those of persons usually qualifying for B-1's or P visas for example. The residence abroad requirement for a student should therefore be considered in a broader light, focusing on the student applicants' immediate intent. While students may not be able to demonstrate strong "ties", their typical youth often conveys a countervailing major advantage in establishing their bona fides: they don't necessarily have a long-range plan, and hence are relatively less likely to have formed an intent to abandon their homes."

The DOS Advisory further notes that even if the student is intending to undertake a course of study for which there is little opportunity in the home country, it is not a basis for denying a visa. This is presumably applicable to a student who wishes to study in a field that has not yet developed in the home country as yet or where the degree may not be directly recognized, such as an American J.D. degree, for practicing law in the home country. Conversely, a student visa applicant cannot be denied a visa even if the country of residence can provide the equivalent quality courses in the subject matter. Thus, even if India offers superior education in engineering at the Indian Institutes of Technology (IITs) and other comparable institutions, this is not a sufficient basis for denying the visa of one who wants to pursue a bachelor's degree of engineering in the United States. "The student has the right to choose where she/he will obtain an education if accepted by the school," notes the DOS Advisory.

Moreover, many students in the US dread to visit their home countries during vacations as they believe that they may encounter difficulties while applying for a new student visa stamp at the US Consulate. The DOS Advisory, fortunately, reassures that consular posts should facilitate the reissuance of the student visa so that students can travel freely back and forth between the US and their home countries. Such a policy makes sense since it encourages students to continue to keep ties with their home countries if they can freely go there on a regular basis.

Finally, the DOS Advisory cautions consular officers not to question the legitimacy or quality of the school. Community schools and lesser known schools "must be accorded the same weight under the law." The DOS Advisory reminds the consul to adjudicate the application on whether an applicant will be a bona fide student regardless of the institution or program of study. Of course, if the consul has reason to question the very authenticity of the school, then the DOS Advisory allows the consul to contact the DHS or the Visa Office in Washington DC.

Absent fraud, in the event that a prospective student is turned down a visa at the consulate based on his or her future intent, as opposed to present intent, or the quality or renown of the educational institution, he or she may want to bring this DOS Advisory to the attention of the consul in a subsequent application.

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