

**FRAUD, TECHNICAL VIOLATIONS, AND/OR MISREPRESENTATION  
THAT COULD TRIGGER H-1B VISA REFUSAL OR ADMINISTRATIVE  
PROCESSING UNDER 221(g) AT A CONSULAR POST (PART VIII of an  
VIII Part Series)**

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Upon approval of H-1B petition by the USCIS, foreign nationals residing abroad may need to go to the U.S. Consulate/Embassy to get an H-1B visa stamped into their passport before they can travel to and enter the United States. Before going for the visa interview, it is very important for a visa applicant to understand the purpose of the visa interview, the discretionary powers vested in the Consular Officers, and most importantly the kind of fraud, technical violations and/or misrepresentation that could result in visa refusal or administrative processing.

First and foremost, it is very important to understand that although Consular Officers cannot re-adjudicate petitions approved by the USCIS, Consular Officers can certainly review the petitions to determine the eligibility of visa applicants. Consular Officers, thus, are vested with wide and discretionary powers. Till date, there is no set mechanism in-place by which a foreign national, applying for a visa abroad, can challenge a Consular Officer's unfavorable exercise of discretion.

To be specific, Consular Officers derive such broad discretionary powers from section 221(g) of the Immigration and Nationality Act (INA). A quick glimpse at Section 221(g) provides the factors that may form the basis of visa refusals or administrative processing. In simple layman terms, the statements in the application or in the papers submitted therewith may trigger visa denial. Further, a Consular Officer may determine that the application does not comply with the INA or regulations. If that happens then Consular Officers is bound to explain clearly "... what documents or other evidence is needed, or what procedural step needs to be completed (e.g., case being submitted to the Department for advisory opinion ...)."

Additionally, a Consular Officer may refuse to issue visas if s/he "knows or *has reason to believe*" that the foreign national is ineligible to receive a visa. Interestingly, although "Reason to believe" is an objective determination based upon facts or circumstances which would lead a reasonable person to conclude ineligibility, it can be formed through hearsay evidence.

In certain cases the final determination about visa can be placed on-hold pending "administrative processing" The Foreign Affairs Manual (FAM) defines "administrative processing" as clearance procedures or the submission of a case to the Department of State (DOS). The same FAM guidance counsels Consular Officers not to reveal to visa applicants the specific reason for administrative processing in a given case.

Further, there is no strict timeline specified for administrative processing resolution. Even though the DOS Administrative Processing webpage informs us that *most* administrative processing is resolved within 60 days of the visa interview, it is very difficult to confirm this claim. In other words, clients whose visa applications are subjected to administrative processing could end up waiting significant amount of time (often in excess of 60 days) until the administrative processing is completed and visa is finally issued. In some cases, the administrative processing of the case can take up to two (2) years.

## **Types of Fraud, Technical Violations, and/or Misrepresentation That May Trigger Administrative Processing/Visa Refusal at Consular Posts**

Understanding the kind of fraud, technical violations, and/or misrepresentation may help avoid the visa refusals or administrative processing at the Consular Posts abroad. Listed below are some typical violations, fraud or misrepresentations that could trigger administrative processing/visa refusal:

- H-1B employer required the beneficiary to pay the ACWIA fee or deducted certain fees associated with filing the I-129 petition, effectively lowering the beneficiary's wages to less than the required prevailing wage;
- Employer failed to pay the beneficiary at least the prevailing wage for the particular occupation in the specific geographical location, as noted and attested to on the LCA filed with DOL;
- Beneficiary was working in a geographical location not covered by a valid Labor Condition Application (LCA) filed with Department of Labor (DOL);
- The employer placed the beneficiary in a non-productive status, commonly referred to as "benching" (where the beneficiaries are not paid or paid less than the full hours specified on the petition), when work was not immediately or continuously available;
- Business did not exist, no evidence of daily business activity, the business location was unable to support the number of employees claimed, or there was no evidence that the employer ever intended for the beneficiary to fill the actual job offered;
- Educational degrees or experience letters submitted were confirmed to be fraudulent;
- Signatures had been forged on supporting documentation; and
- Beneficiary performing duties that were significantly different from those described on the LCA and I-129 petition.

### **Primary Fraud or Technical Violation Indicators**

In addition to the typical violations such as fraud or misrepresentations that could trigger administrative processing/visa refusal, there are certain primary fraud or technical violation indicators (factors) that Consular Officers always remains on lookout. Results of a study conducted by the Office of Fraud Detection and National Security (FDNS) in collaboration with USCIS indicated that H-1B petitions filed for accounting, human resources, business analysts, sales and advertising occupations are more likely to contain fraud or technical violation(s) than other occupational categories. The following is a list of primary fraud or technical violation(s) indicators that potentially could contribute to administrative processing/visa refusal at a U.S. Consulate office abroad.

- Firms with 25 or fewer employees have higher rates of fraud or technical violation(s) than larger-sized companies.
- Firms with an annual gross income of less than \$10 million have higher rates of fraud or

technical violation(s) than firms with an annual gross income greater than \$10 million.

- Firms in existence less than 10 years have higher incidences of fraud or technical violation(s) than those in existence for more than 10 years.
- Beneficiaries with only bachelor's degrees had higher fraud or technical violation(s) rates than did those with graduate degrees.

In conclusion, having an approved petition by the USCIS is not a guarantee that a foreign national will get an H-1B visa at the Consular Post abroad. As previously stated, Consular Officers have wide discretionary powers pertaining to visa issuance. Not only that, there is no set mechanism to challenge the Consular Officer's unfavorable exercise of discretion. While "Consular Non reviewability" is presently being challenged in Federal Courts, the issue is still far from being resolved.

To avoid visa refusal or elongated administrative processing, H-1B visa applicants and prospective H-1B employers should take into consideration the type of fraud, technical violations, and/or misrepresentation that could result in such decisions and prepare accordingly.

More so, because small organizations, new organizations or organizations reporting a certain level of annual gross income are always on the radar of Consular Officers as to fraud/technical violations, visa applicants should prepare well in advance and carry as many supporting financial or corporate documents as they can to prove that the petitioning company is not a shell business.

If you should have any questions or need more information about the way that the U.S. Immigration and Nationality Laws may impact you, your family, your friends or your colleagues, please feel free to contact the U.S. Immigration and Nationality Lawyers at the NPZ Law Group – VISASERVE – U.S. Immigration and Nationality Lawyers by e-mailing to us at [info@visaserve.com](mailto:info@visaserve.com) or by calling us at 201-670-0006 (x107) or by visiting our Law Firm's website at <http://www.visaserve.com>