THE DIVERSITY LOTTERY—A DECEPTIVELY SIMPLE PROGRAM (AN UPDATE)

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INTRODUCTION

The Diversity Immigrant Visa Program (DV) represents one of the most generous immigrant visa categories with up to 55,000 visas allocated annually.[1] It is the only option for persons who are unable to qualify for employment, family, or refugee benefits. While luck is certainly a key factor in the initial lottery selection process, other important and controllable variables that affect an applicant's chances of success include cross-chargeability strategies, speed, and a precise adherence to the program's rules and regulations. Most importantly, attorneys need to closely examine their client's immigration history to ensure that their lottery applications do not unwittingly invite deportation or excludability charges. With the recent four-fold increase in Department of State fees, the application process has become too costly for mistakes.[2] This article provides an in-depth analysis of the Diversity Visa program. It examines the regulations and requirements, and outlines strategies to enhance the prospects for success in this lottery-within-a-lottery type program.[3]

Various strategies are examined showing how it can be advantageous for some natives of certain over-represented or visa-exhausted countries to cross-charge to more favorable, underrepresented countries. This article also comments on the new electronic filing experience and reviews the substantive standards for meeting the education or work experience requirement; impediments to status based on grounds of excludability and unlawful status under INA §212(a); and the advantages and disadvantages of filing for adjustment of status as opposed to consular processing.

Finally, counsel should be aware that the Department of State (DOS) no longer destroys the information disclosed on the lottery applications. Rather, the millions of applications now serve a dual purpose of generating a massive database of millions of names, biographic information, and photographs of people who voluntarily participate in this seemingly innocuous lottery. The data will be available to intelligence and security agencies, and DOS believes it will be a way to "thwart terrorists or criminal aliens who may use the DV program to enter the United States."[4] Having personal information including the name, date, country of birth, and address of ten million applicants annually would not appear very useful to intelligence agencies seeking to stop people who may wish to cause harm to our country, but it may be useful to an agency such as U.S. Immigration and Customs Enforcement (ICE) searching for current addresses of the several hundred thousand

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[1] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 et seq.) §203 provides only 10,000 visas annually for skilled workers and 40,000 visas for individuals of extraordinary ability; whereas, INA §201 sets aside 55,000 visas for the diversity visa lottery. 8 CFR §1153(b)(1), (b)(3); 8 CFR §1153(c).

[2] Effective March 8, 2005, the Diversity Lottery Visa surcharge increased from $100 to $375. Accordingly, the principle applicant and each derivative family member who chooses to consular process must pay $755 in government filing fees alone. 70 Fed. Reg. 5372 (Feb. 2, 2005), *posted on* AILA InfoNet at Doc. No. 05020360 (Feb. 3, 2005).

[3] DOS customarily notifies twice as many "winners" than visas available—for the DV-2004 lottery, 111,000 people were notified for 50,000 winning slots.

[4] 68 Fed. Reg. 49353 (Aug. 18, 2003).

continued

people ordered removed or who have overstayed their visas. After 15 years of advising that it is safe for out-of-status aliens to enter visa lotteries, the present government's attitude toward immigrants has made it necessary to caution persons entering the diversity visa lottery who may be out of status or otherwise removable.

AUTHORITIES

Statutory

Immigration and Nationality Act of 1952 (INA); INA 203(c), 8 USC 1153(c)—Diversity Immigrants

The INA provides four primary ways by which an individual may immigrate to the United States—family, employment, asylum, and diversity visa program.[5] Participants in the DV program are nationals of "underrepresented countries," which have been less represented in employment and family-based preference categories. U.S. Citizenship and Immigration Services (USCIS) determines the DV regional limits for each year according to a formula specified in section 203(c) of the Act.[6] Nationals of "high admission" countries are thereby precluded from participating.[7]

The annual worldwide level of diversity immigrants slotted for "green cards" is fixed at 55,000.[8]

Regulations

22 CFR §42.33—Diversity immigrants

DOS is responsible for conducting and processing the petitions for consideration in the annual DV lottery. DOS regulations define the eligibility criteria, the limitations, and the procedure by which a participant files an application for consideration. DV program regulations can be found under 9 U.S. Dep't of State, *Foreign Affairs Manual*, Notes to 22 CFR §42.33 (FAM).

KEY CONSIDERATIONS

Requirements

Foreign State Chargeability

To be eligible to participate in the DV program, an individual must be born in or chargeable to a low-admission foreign state, as determined by the Attorney General.[9] Low-admission foreign states are all countries except for the 15 designated high-admission foreign states for that year. The ineligible, high-admission countries for DV-2006 included Canada, China (mainland-born), Colombia, Dominican Republic, El Salvador, Haiti, India, Jamaica, Mexico, Pakistan, Philippines, Russia, South Korea, United Kingdom (except Northern Ireland), and Vietnam. However, natives of Northern Ireland, Hong Kong SAR, and Taiwan are eligible.[10]

The applicants are selected from six separate regional lotteries: Africa, Asia, Europe, North America, Oceania, and South America. The 55,000 visas are not equally divided among the six regions. In the past, approximately 42 percent of the visas were allocated to natives of Europe; 39 percent to natives of Africa; 13 percent to natives of Asia; 4 percent to natives of South America; and 1.5 percent to natives of Oceana and North America. No more than 7 percent of the DV visas may go to applicants from a particular country.[11]

Education or Work Experience

The DV immigrant must have at least a high school education or its equivalent or, within the five years preceding application for a diversity visa, two years of work experience in an occupation requiring at least two years of training or experience.[12] Only the winner—not derivative beneficiaries, such as a spouse—must satisfy this requirement. Most children under 16 years of age are effectively disqualified from participating as principal applicants because they are usually unable to meet this require-

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[5] INA §210(c)(3).

[6] INA §203(c)(1)(B). For an in-depth study of the apportionment of visas, see K. Grzegorek & B. Wolfsdorf in 1 *Immigration and National Law Handbook* at 245–57 (1994–95 ed.).

[7] INA §203(c)(1)(E)(i).

[8] INA §203(e). However, section 203(d) of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (NACARA) passed by Congress in November 1997 stipulated that up to 5,000 of the 55,000 annually-allocated diversity visas be made available for use under the NACARA program. The reduction of the limit of available visas to 50,000 for other countries began with DV-2000.

[9] INA §203(c)(1)(E)(i).

[10] "DV Lottery Instructions" at http://travel.state.gov/visa/immigrants/types/types_1318.html (hereinafter DV Instructions).

[11] INA §203(c)(1)(E)(v).

[12] INA §203(c)(2).

ment.[13] However, children under 21 years of age who have high school diplomas can "double dip"—they can apply individually and benefit derivatively through their parents.

Definitions and Considerations

Native

DOS defines "native" as one who is "born within the territory of a foreign state, or entitled to be charged for immigration purposes to that foreign state pursuant to INA §202(b), as amended."[14] The term is critical to the diversity program, since the program is not concerned with citizenship, but rather focuses on country of birth and alternative chargeability in determining whether a person can be charged to a particular country. It may make the crucial difference allowing an applicant to apply from an eligible country even though they are nationals of an ineligible country. An applicant can also cross charge to a higher allocation region (*e.g.*, Africa) or out of an over-subscribed country (*e.g.*, Albania and Bangladesh).

Foreign State of Chargeability

22 CFR §42.12 states that "an immigrant shall be charged to the numerical limitations for the state or dependent area of birth, unless the case falls within one of the exceptions to the general rule of chargeability provided by INA §202 (b) and … to prevent the separation of families."

The general rule of chargeability under INA §202(b) is that the country of birth determines the state of chargeability. The foreign state, as it exists at the time of visa application, is the state of chargeability, *not* the state that existed at the time of the applicant's birth. This is particularly important as the land where the person was born may now belong to a different state. For example, a Pakistani national who was born in what is now Bangladesh may be eligible even though Pakistanis are not eligible. If the state of an applicant's birth no longer exists, has different boundaries, or was a colonial territory, the Secretary of State will specify the foreign state that will be deemed to be the applicant's country of origin for DV purposes.[15]

To promote family unity, the exceptions of alternate or cross chargeability allow applicants to charge to their parents' or spouses' countries of birth. Cross chargeability allows beneficiaries of family—and to a lesser extent employment-based immigrant petitions—to join shorter waiting lines and for DV applicants to remove themselves from ineligible countries.

Within the DV scenario, the first exception prevents the separation of a child from a parent. An immigrant child may be charged to the same foreign state to which a parent is chargeable if the child is accompanying or following-to-join the parent.[16] In short, a child can be charged to his or her parents' country of chargeability; however, the reverse is not allowed.[17] All unmarried children under 21 years of age may claim derivative eligibility for an immigrant visa from a parent.

Similarly, a second exception prevents the separation of a married couple. An immigrant spouse may be charged to a foreign state to which his or her spouse is chargeable if accompanying or following-to-join.[18]

For both of these exceptions, the relationship must exist at the time of the principal applicant's admission to the United States with an immigrant visa or approval of their adjustment to permanent resident status.[19] Accordingly, a spouse who acquired any time up to admission or formal adjustment of status may benefit—even if the relationship did not exist at the time the petition for consideration was filed.

Practice Pointer: In contrast, a relationship must exist at the time a lottery application is initially filed if the winning applicant is a native of an ineligible state. Marriage after registration to an applicant from an eligible state would not qualify the couple for visas. However, the reverse situation would qualify the couple for visas where the winning applicant is a native of an eligible state and before visa issuance, and marries an applicant from an ineligible state.

Families may file as following-to-join or accompanying applicants to the principal applicant for purposes of the diversity program. However, those claiming alternate-state chargeability from a spouse,

[13] 9 U.S. Dep't of State, *Foreign Affairs Manual*, Note 6.7 to 22 CFR §42.33.

[14] 59 Fed. Reg. 15300 (Mar. 31, 1994); 9 FAM §42.33, Note 4.1; 22 CFR 40.1(m).

[15] INA §202(d).

[16] 22 CFR §42.12(b).

[17] 9 FAM §42.12, Note 3.9.

[18] 22 CFR §42.12(c).

[19] 9 FAM §42.12, Note 3.3.

should note that, "when one spouse confers preference status upon the other and the other spouse confers derivative foreign state chargeability, both are considered principal applicants—one for the purpose of conferring a more favorable status and the other for the purpose of conferring a more favorable chargeability. In such cases, both must be issued visas and must apply for admission simultaneously."[20] It is our position that the spouse who confers favorable chargeability for the DV winner will not have to also fulfill the education or experience requirements.

An applicant may apply for derivative chargeability even though the parent or spouse has not actually been charged to a foreign state, to confer chargeability on a child or spouse. It is sufficient that the applicant would be chargeable to that foreign state.[21] The applicant may therefore choose his or her spouse's state of chargeability if it is more advantageous than his or her native state even if the spouse does not use that state.

Practice Example: A native of the United Kingdom (an ineligible state) is married to a permanent resident who is a native of France (an eligible state). The British national can register for the DV program claiming France as an alternate-state of chargeability even though his spouse will not use France to obtain a DV visa.

A third exception, known as the "missionary exception" applies when the DV applicant was born in a foreign state in which neither his nor her parents were born or had residency at the time of the applicant's birth.[22] To claim alternate state chargeability under this exception, 22 CFR §42.12(e) provides:

> An alien who was born in a foreign state…in which neither parent was born, and in which neither parent had a residence at the time of the applicant's birth, may be charged to the foreign state of either parent as provided in INA §202(b)(4). The parents of such an alien are not considered as having acquired a residence within the meaning of INA §202(b)(4), if, at the time of the alien's birth within the foreign state, the parents were *visiting temporarily* or *were stationed there* in connection *with the business or profession* and *under orders* or instructions *of an employer, principal, or superior authority foreign* to such state (emphasis added).

A fourth exception applies when the person was born in the United States, but is *not* a U.S. citizen—for example, the child of a diplomat or a person who did acquire U.S. citizenship by birth in the United States but subsequently lost his or her citizenship.[23] Such persons shall be considered as having been born in the country of which he or she is a citizen or subject, or if he or she is not a citizen or subject of any country, in the last foreign country in which he or she had his or her residence as determined by a U.S. consular officer.[24]

For these last two exceptions, the duration of the parent's assignment in the foreign country is not the controlling factor in determining whether they had a residence in that country. The test is whether, at the time of the child's birth, the parent or parents were stationed in such country *under orders or instructions* of an employer, principal, or superior authority whose business or profession was foreign to that foreign state.[25] It is critical to note that longstanding assignments do not destroy cross-chargeability. Rather the evaluation is made as to the parents' status at the time of the applicant's birth.

Conversely, if the parents migrate permanently to the country of the applicant's birth before the application is filed, alternate-state chargeability is not available.[26]

High School Education or Its Equivalent

For the DV program, DOS defines high school education or its equivalent to mean "successful completion of a twelve-year course of elementary and secondary education in the United States or successful completion in another country of a formal course of elementary and secondary education comparable to completion of twelve years' elementary and secondary education in the Unites States."[27]

Practice Pointer: Remember, a General Education Diploma (GED) test or its foreign equivalent will not satisfy this requirement.

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[20] 9 FAM §42.12, Note 3.8.

[21] 9 FAM §42.12, Note 3.2.

[22] 22 CFR §42.12(e).

[23] 56 Fed. Reg. 46099 (Sept. 9, 1991).

[24] INA §202(b)(3).

[25] 9 FAM §42.12, Note 5.

[26] Letter from Cornelius D. Scully, III, Director, Office of Legislation, Regulations and Advisory Assistance, Visa Office, to Donal Eoin Reilly, Esq. (Mar. 15, 1993), *reprinted in* 70 *Interpreter Releases* 695–96 (May 24, 1993).

[27] 22 CFR §42.33(a)(2).

Practice Pointer: An applicant may present a master's degree to meet this requirement.

Determination of Work Experience

To determine whether a particular occupation is one that requires at least two years of training or experience, DOS will refer to the Department of Labor's O*Net on-line database, *www.onetcenter.org*.[28]

Previously, a Specific Vocational Preparation (SVP) rating of at least a "7" (two to four years of experience) was required for a job to meet the DV requirement. However, jobs with an SVP of "6" which required as much as two years of experience and thereby met DV experience criteria, were not acceptable. Now the State Department refers to the O*Net system which uses zones to classify standard vocational training for a particular occupation. Zone 3 includes occupations for which "medium preparation is needed" usually with one or two years of training and/or have completed three or four years of apprenticeship or several years of vocational training. Zone 3 occupations are assigned SVP ranges, which include SVP 6 to SVP 7. The ambiguity of the designated standard further complicates the evaluation of whether a "winner" meets the statutory eligibility criteria. For example, fashion designers are classified under Zone 3, but are assigned an SVP 7 because they can require two years of training or experience.

On its DV website, the DOS posted a list of occupations requiring at least two years of training or experience. However, the list is misleading as it cites over 50 Zone 5 occupations such as actuaries, surgeons, lawyers, anesthesiologists and environmental scientists.[29] Of the approximately 300 listed occupations, the DOS only cited 10 occupations which fall in Zone 3 and 1 which falls in Zone 1 (below SVP 4). Accordingly, the DV applicant should submit documentation explaining why the job requires two years of training or experience when reference to the O*Net system does not on its own resolve the matter.

Derivatives

Successful lottery "winners" are also granted immigrant visas for their spouses and children under the age of 21 years. The immigrant visas granted to the derivatives are counted against the 50,000 diversity visa cap. For the derivative to benefit, he or she must be listed on the application. If a winner omits or fails to disclose an existing spouse or child, such a pretermitted derivative will not be eligible. Moreover, the principle applicant will be disqualified as well.[30] However, DOS will provide an exception for after-born children and spouses from marriages subsequent to the application, provided that they are bona fide derivatives who can overcome a presumption of fraud.[31]

The FAM states that the death of the principal applicant will result in the automatic revocation of the application and the derivative beneficiaries will no longer be entitled to DV classification.[32] However, H. Edward Odom, Chief, Advisory Opinion Division, DOS Directorate of Visa Services, had previously expressed a more lenient policy, stating:

> Since a DV applicant is instructed to list the spouse's name and date and place of birth in the petition with which they registered for DV eligibility, the visa office believes that when the principal registrant dies before he has an opportunity to apply for a DV visa or adjustment of status, the spouse listed on the petition may be considered an alternate principal applicant. Therefore, if the spouse was listed on the DV petition, she can apply for a DV visa after the death of her spouse, as if she was the principal applicant.[33]

While the death of a petitioner usually causes automatic revocation, USCIS has authority to provide "humanitarian re-instatement." Although it is difficult to qualify for humanitarian re-instatement, DOS should promulgate regulations similar to USCIS or, in the absence of DOS regulations, USCIS rules should govern.

Age-Outs

The Child Status Protection Act of 2002 (CSPA)[34] provides relief to certain derivative bene-

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[28] 68 Fed. Reg. 49353 (Aug. 18, 2003).

[29] "Occupations Requiring at Least Two Years of Training or Experience to Perform" at http://travel.state.gov/visa/immigrants/types/types_1319.html

[30] DV Instructions, *supra* note 10.

[31] DOS cable, 98 State 099723 (June 3, 1998), *reprinted in* 75 *Interpreter Releases* 815 (June 8, 1998).

[32] 9 FAM §42.33, Note 5.2-2.

[33] Letter from H. Edward Odom, Chief, Advisory Opinion Division, DOS Directorate of Visa Services, to Stanley Silver, Attorney at Law (Aug. 16, 1996).

[34] Child Status Protection Act of 2002, Pub. L. No. 107-208, 116 Stat. 927, *posted on* AILA InfoNet at Doc. No. 02080740 (Aug. 7, 2002).

ficiaries of diversity lottery visa applications who would otherwise lose eligibility for derivative immigration benefits when they turn 21 years of age (*i.e.*, they "aged-out").

To calculate whether an aged-out derivative beneficiary can benefit from CSPA, DOS will use the period between the first day of the diversity visa mail-in application period for the program year in which the principal applicant qualified and the date of the congratulatory letter notifying the applicant that he or she has been selected as the period during which the "petition is pending."[35] This period will then be subtracted from the derivative beneficiary's age on the date the diversity visa becomes available to the principal applicant (becomes current).

The provision is best understood with an example. A principal applicant is selected for the DV-2004 program for which the first date for mailing the application was October 1, 2002. The principal applicant receives a congratulatory letter dated May 30, 2003, notifying her that she has been selected. Accordingly, the diversity visa petition has been pending for 242 days. The principal applicant has a high lottery number and is finally able to proceed with her immigrant petition and receive a diversity visa on September 1, 2004. She has a daughter and a son. The daughter turned 21 on October 1, 2003, and the son turned 21 on July 1, 2004. The daughter cannot benefit from CSPA because she has been 21 for more than 242 days. In contrast, the son can benefit, because he has been 21 for less than 242 days.

PROCEDURES

DOS modernized the DV program to comply with the intensified security measures mandated by the USA PATRIOT Act,[36] the Enhanced Border Security and Visa Entry Reform Act of 2002,[37] and the Homeland Security Act of 2002.[38] The most significant change to the program is the new electronic filing procedure. DOS will only accept completed Electronic Diversity Visa (EDV) Entry Forms submitted electronically at *www.dvlottery.state.gov*. Paper entries, which are mailed in, are no longer accepted. Possibly in light of the DV-2005's technical difficulties, the registration period commenced later than usual on November 5, 2004 instead of at the beginning of the fiscal year as in the past. The registration period ran for 63 days instead of 30 days.[39] To avoid some of the difficulties experienced by registrants the prior year, the DOS tripled the number of servers hosting the registration website.[40]

During the designated 63-day period, any foreign national who can be charged or cross-charged to an eligible country, with the requisite high school diploma or work experience, could electronically file a petition for consideration with DOS.[41]

The EDV Entry Forms ask applicants to provide the applicant's name; date and place of birth; and if seeking cross-chargeability, country of chargeability; spouse's and children's names;[42] dates and places of birth; and current mailing address. The applicants must also attach separate digital photographs of themselves, their spouse and children less than 21 years of age—expect children who are already U.S. citizens or permanent residents. The photographs must be in the Joint Photographic Experts Group (JPEG) format and meet specific resolutions (320 pixels high by 240 pixels wide or 240 pixels high by 320 pixels wide), color depths (24-bit color, 8-bit color or 8-bit grayscale), and byte (maximum 62,500 bytes) requirements.[43] If a photograph print is scanned, the print must be two inches square and be scanned at a resolution of 150

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[35] "DOS Issues Revised Cable on Child Status Protection Act," *posted on* AILA InfoNet at Doc. No. 03020550 (Feb. 5, 2003).

[36] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (USA PATRIOT Act).

[37] Pub. L. No. 107-173, 116 Stat. 543 (Border Security Act), *posted on* AILA InfoNet at Doc. No. 02052445 (May 24, 2002).

[38] Pub. L. No. 107-296, 116 Stat. 2135, *posted on* AILA InfoNet at Doc. No. 02120240 (Dec. 2, 2002).

[39] Office of the Spokesman, "Media Note: 2006 Diversity Visa Lottery Registration Begins" (Nov. 5, 2004).

[40] Id.

[41] 22 CFR §42.33 (a).

[42] The applicant is instructed to provide the name, date, and place of birth of all natural and legally-adopted children and stepchildren, who are unmarried and under the age of 21, even if the applicant is no longer married to the child's parent and even if the child does not currently reside with the applicant or immigrate with the applicant. The applicant does not have to list children who are U.S. citizens or permanent residents. This can be an onerous requirement if the applicant is estranged from his or her spouse and/or children. DV Instructions, *supra* note 10.

[43] *Id.*

dots per inch and with specific color depths.[44] Submitting precise digital photographs can be impossible for applicants living in remote locations. Presumably, these extensive requirements are designed for DOS's new facial recognition software. (Since facial recognition techniques are becoming increasingly sophisticated, the U.S. government is moving increasingly toward adopting this as the primary standard for identifying people.) If the digital image does not conform to the specifications, the application will be automatically disqualified. The DOS reported that 5,221 entries were eliminated from the DV-2006 program with the help of facial recognition and knowledge discovery software.[45] Conversely, if the EDV Entry Form is accepted, the applicant will receive an electronic confirmation notice.

Coincidently, an original signature on the petition and the photograph, which was traditionally perceived as a conclusive test of a fraudulent entry and which resulted in so many disqualifications, is no longer required. Rather, DOS believes that electronic filing offers other anti-fraud benefits, such as crosschecking for multiple submissions by matching digital images. Of the 6.3 million entries received for the DV-2006 program, the anti-fraud technology identified and eliminated 31,334 exact duplicate entries.[46]

These instructions are deceptively simple. DOS, wary of fraud, demands strict compliance. A minor typographical error appears to raise a presumption of fraud because DOS has concluded that most errors, particularly in the spelling of the name, indicate that duplicate petitions may have been filed. Any differences in the spelling of a name on the petition when compared to the birth certificate will disqualify the applicant. Almost three million applications were disqualified from the DV-2004 program for failure to comply with the instructions.[47]

The Kentucky Consular Center (KCC) assigns random numbers to the entries received within the registration period and separates them by region. A computer program randomly rank orders the numbers for each region. The KCC then selects, in the rank orders determined by the computer, a quantity of entries for each region estimated to be sufficient to ensure the usage of all possible DV immigrant visas. This is how approximately 100,000 "winning tickets" are selected for the 50,000 available DV visas.

The key consideration for a DV "winner" is the expeditious analysis and filing of the case because he or she is entitled to apply for visa issuance only during the fiscal year for which the application was submitted.[48]

Practice Pointer: The actual adjustment of status interview or application at the port of entry must be successfully completed and a visa granted no later than *September 30* of the fiscal year. (Immigrant visas are valid for six months, so successful applicants who chose to consular process do not have to enter the United States before September 30, but must complete the immigrant application process and obtain their immigrant visas by September 30th.). The September 30 deadline appears to be etched in stone, even when the government was in error or delinquent. The Eleventh Circuit Court of Appeals overturned a district court order of mandamus relief to Charles Nyaga, a winner of the 1998 DV program who was unable to complete the process by September 30, 1998 because the government failed to process his application in a timely manner.[49] Outraged by the experiences of Mr. Nyaga and others with the DV program, Senator Saxby Chambliss (R-GA), Chair of the Senate Judiciary Subcommittee on Immigration, Border Security, and Citizenship, introduced legislation that would enable a winner to remain eligible beyond the fiscal year in which they applied.[50]

The winner must decide whether to immigrant visa process abroad or adjust status within the United States—and regardless of the decision, the winner should expeditiously file the application. With more than 100,000 winners competing for 50,000 visas, winning the lottery implies a race to the finish as less than half of winners actually obtain immigrant

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[44] *Id.*

[45] "2006 Diversity Visa Lottery Registration," *posted on* AILA InfoNet at Doc. No 05021163 (Feb. 11, 2005).

[46] *Id.*

[47] "DV-2004 'Winners' Notified," *posted on* AILA InfoNet at Doc. No. 03062547 (June 25, 2003).

[48] 9 FAM §42.33, Note 5.2-1.

[49] *Nyaga v. Ashcroft*, 323 F.3d 906 (11th Cir. 2003). Likewise, in December 2003, the Ninth Circuit held that the statutory deadline could not be equitably tolled where a notary defrauded a winner when she attempted to file an application for adjustment of status. *Carrillo-Gonzales v. INS, posted on* AILA InfoNet at Doc. No. 04010523 (Jan. 5, 2004).

[50] S. 2089, "Text of Bill that Would Preserve DV Eligibility in the Face of Processing Delays" (Feb. 12, 2004), *posted on* AILA InfoNet at Doc. No. 04021861 (Feb. 18, 2004).

visas. In cities where adjustment applications take many months, the choice becomes even more difficult. Furthermore, since visas cannot be guaranteed because of the limited annual quotas, advising a registrant who has eligibility or exclusionary problems becomes even more complex (particularly where the registrant's rank number is high). This is because person with high rank order number may only have 30 to 60 days to complete their adjustment whereas security checks alone could take 90 days.

For adjustment applicants, most USCIS district offices have developed "special handling" procedures for DV cases. Even if a visa is currently available, a DV applicant can only file his or her adjustment of status application after October 1, the first day of the fiscal year. In February 1999, Michael Pearson, legacy INS Executive Associate Commissioner for Field Operations, issued a memorandum to the field instructing the district offices to accept adjustment of status applications filed under the DV program any time during the 90-day period preceding the cut-off date provided in the Visa Bulletin.[51] Adjustment interviews are scheduled shortly after filing the application as opposed to the often lengthy normal processing times for family-based petitions. In a cable from James A. Puleo, Executive Associate Commissioner of legacy INS, all local offices were instructed to "process these cases promptly."[52] This cable also outlines special procedures for expeditious processing of Form I-824, Application for Action on an Approved Application or Petition for following-to-join family members and Form I-601, Application for Waiver of Grounds of Excludability.

Winners who choose to immigrant visa process can file their properly completed "Packet Three" with the KCC before October 1st, the beginning of the fiscal year and should try to do so as soon as possible. When their rank-order or case number becomes current, the National Visa Center will send the winner the "Packet Four," which includes the appointment notices for visa interviews at the U.S. consular posts.

In the event that a consular post closes for security reasons or is unable to accommodate DV applicants, other posts may accept out-of-district cases on a discretionary basis upon appeal to the Visa Office.[53]

The successful "winner" does not have a visa number allocated until a "Packet Four" has been issued with an immigrant visa appointment date, or, in the adjustment scenario, the visa number is ordered and received by the USCIS district offices. In most district offices, visa numbers are only ordered when the case is completed, whereas DOS orders them when setting the appointment. This created a major advantage for immigrant-visa processing appointments. Legacy INS has instructed that "DV visa number requests should be submitted to the Visa Office as soon as possible when cases are ready for adjustment of status."[54] However, it is apparent that not all USCIS offices have done so, and many registrants who have an appointment scheduled far ahead will find visa numbers unavailable at the time of interview. This will have drastic deportation consequences for out-of-status applicants. This situation was partially alleviated by a subsequent directive from legacy INS, which requested "*visa numbers be requested from the Department of State without delay*" (emphasis in original).[55]

OTHER CONSIDERATIONS

Key Grounds of Exclusion to Consider in Connection with the DV Program: INA §212(a)[56]

The Diversity Visa provisions are incorporated into the Immigration and Nationality Act.[57] As a result, all provisions, grounds of exclusion and other issues relating to immigrant visa processing for employment- and family-based applicants also apply to DV applicants.

Security Checks

On September 30, 2003, the 2003 Diversity Visa program ended with hundreds of eligible "winners" primarily from Middle Eastern countries being una-

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[51] INS Memorandum, "INS Instructs on Processing of Diversity Visa Adjustment of Status Applications," *reprinted in* 76 *Interpreter Releases* 198 (Feb. 1, 1999).

[52] INS Cable (Nov. 2, 1994), *reprinted in* 71 *Interpreter Releases* 1524 (Nov. 7, 1994).

[53] "DOS Answers to AILA Questions (March 4, 2004), *posted on* AILA InfoNet Doc. No. 04042164.

[54] *See* "DV-1 Visa Availability for February 1995" (Feb. 17, 1995), *posted on* AILA InfoNet at Doc. No. 95021790 (Feb. 17, 1995).

[55] INS Memorandum, "DOS Memo Regarding FY 1995 DV Lottery Cases," James A. Puleo, Executive Assoc. Comm'r (Feb. 24, 1995), *posted on* AILA InfoNet at Doc. No. 95030390 (Mar. 3, 1995).

[56] INA §212(a).

[57] INA §203(c).

ble to complete their diversity visas applications due to delays caused by the post-9/11 delays in processing new consular security checks. The USA PATRIOT Act and the Border Security Act intensified security measures for nationals of the seven states designated as sponsors of state terrorism and approximately 26 predominantly Muslim countries, to be expanded to 33 countries.[58] Nationals from most of these countries (except Pakistan) are eligible to participate in the Diversity Visa program as the Secretary of State has determined that they are under-represented in the immigrant pool.

Diversity visas are allocated based on rank selection numbers allocated to the six regional areas. Many diversity visa winners who become current during the final months are from the countries designated for heightened security checks and are unable to complete their applications, as they have to complete lengthy security checks, some of which took up to four months to complete. While security clearances for citizens, nationals, or persons born in these predominantly Muslim countries were supposed to take approximately 24 days, no visas may be issued until the clearance is issued, regardless of the delay.[59] Since it was mainly males aged 14 to 45 years who were required to undergo these security checks, the process caused many families to splinter. For example, if the wife was the primary applicant, she could receive her diversity visa, but was unable to immigrate with her husband because his application was not completed in a timely manner because of the new security clearance. As a result, many male derivative spouses were unable to receive the diversity visas before the program ended on September 30, 2003. For many such casualties, their only option is to wait over five years before they are reunited with their spouses based on second preference family-based immigrant petitions.

A diversity visa applicant who was born in or is a citizen of Iran, Iraq, Libya, Syria, Cuba, Sudan, or North Korea, the states designated as sponsors of state terrorism, is prohibited from receiving a visa by section 306 of the Border Security Act until the Secretary of State, in consultation with the Attorney General and other relevant agencies, has determined that the applicant "poses no safety or security threat to the United States." Although DOS has indicated that it is likely to get these times drastically reduced to within a month, many of these clearances have been taking up to four months. It appears that applicants who applied to adjust status in the United States may not have been subjected to these delays.

Two-Year Home Residence Rule

The INA does not provide a special waiver for J-1 exchange visitors who are subject to the two-year foreign residency requirement.[60] Exchange visitors must first determine if they are subject to the home residence rule, and then try to get expeditious waivers as they only have one year to complete the processing. Many successful "winners" are surprised to find that by the time they get waivers, the visas have become unavailable. Even worse consequences ensue when they discover that failure to expeditiously process the permanent immigrant visa—with a waiver—can result in an inability to revert back to temporary J-1 exchange visitor status due to immigrant intent demonstrated by pursuit of the DV application. This can result in disruption of the academic program and the individual is in a worse position than if he or she had not been selected.

Visa Fraud

Material misrepresentation on a visa application or upon entry to the United States can result in a permanent bar from visa benefits. INA §212(a)(6)(C) (misrepresentation provision) provides that an "alien who by fraud or willful misrepresentation of a material fact seeks to procure or has sought to procure or has procured a visa, other documentation or entry into the United States or other benefit provided under the Act" is excludable. Applicants found excludable on this ground would need to have a U.S. citizen or permanent resident immediate relative to apply for a waiver.

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[58] Although there is no official list, the list of countries reportedly affected by these restrictions includes, but not limited to: 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. For an in-depth analysis of security clearances, see T. Walsh and B. Wolfsdorf, "Consular Processing—New Restrictive Security Measures Change the Playing Field, A 2003 Update" *Homeland Security, Business Insecurity: Immigration Practice in Uncertain Times* 43 (AILA 2d prtg. Feb. 2003).

[59] *See* U.S. Dept. of State, Office of Inspector General, Memorandum Report ISP-1-03-26, "Review of Nonimmigrant Visa Issuance Policy and Procedures" (Dec. 2002), *posted on* AILA InfoNet at Doc. No. 02122042 (Dec. 20, 2002).

[60] 9 FAM §42.33, Note 9.3.

Out-of-status DV applicants who have committed visa or entry fraud should proceed with caution prior to submitting their applications. Certain out-of-status lottery registrants who may have made material misrepresentations to obtain visas or entry—by traveling abroad and returning with multiple-entry tourist visas or the visa waiver program while living without permission in the United States—may also be affected. Lottery "winners" in the United States are often out-of-status, and some have overstayed the visa waiver program or multiple-entry visitor visas. Re-entering the United States on a tourist visa while working in the United States is usually sufficient to sustain a visa fraud finding. Also, tourists or students who start work immediately after arrival on visitor visas are excludable for misrepresenting their purpose upon entry. Denial of adjustment of status applications leads to institution of removal proceedings against unsuccessful DV "winners."

Public Charge

DV immigrants must meet the public charge category by showing that they are self-supporting, have sufficient skills and/or education to find employment, or have friends or family who will support them on arrival in the United States.[61] Affidavit of Supports (Form I-864) are not required.[62]

With 2005 Poverty Income Guidelines at $24,187 for a family of four, DV winners have quite a high standard to meet. In many countries only a small percentage of the population earns over $24,187 annually. For example, Bangladesh, which had 7,404 registrants for DV-2005 program, has a GDP capita income (PPP US$) of $1,610 and an adult literacy rate of 59.4 percent.[63] Accordingly, only the wealthiest sector of Bangladeshi society can overcome INA §212(a)(4), which states that "a person who, in the opinion of the consular or immigration official, is likely to become a public charge" is excludable. As in any immigrant visa application, the applicant must show sufficient assets, income, or a sponsorship to meet the poverty guidelines. Since many DV winners have no pre-arranged employment or family ties in the United States, this issue arises frequently.

The relatively low DV criteria—a high school diploma or two years of experience in a job requiring two years of training, education or experience—does not automatically satisfy the public charge requirement. Documentation to overcome the public charge issue is required in addition to the evidence of education and experience. As in any case

> to determine public charge, the [USCIS] applies a totality of the circumstances approach which includes whether the alien has received public assistance, his or her age, capacity to earn a living, health, family, situation, work history, affidavits of support and physical and mental condition.[64]

Three- and Ten-Year Bars

Since out-of-status lottery winners cannot adjust in the United States, their only option would be to immigrant visa process abroad. However, INA §212(a)(9)(B)(i) prohibits admission to an applicant who:

> was unlawfully present in the United States for a period of more that 180 days but less than 1 year, voluntarily departed the United States … and again seeks admission within 3 years of the date of such alien's departure or removal, or
>
> has been unlawfully present in the United States for 1 year or more and again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is admissible.

Moreover, very few lottery "winners" will qualify for a waiver which must be based on extreme hardship to an immediate relative citizen or lawful permanent resident.[65]

Unfortunately, the filing of a DV lottery petition does not fall under the protections of INA §245(i).[66] This provision allows immigrants with pre-April 30, 2001 priority dates to adjust status in the United States as long as they had properly filed approvable immigrant petitions or labor certification applications with the Attorney General or the Department of Labor respectively. Since DV applications are filed with DOS, this strict interpretation has resulted in many DV applicants being unable to process their winning selections in the United States by adjust-

[61] 9 FAM §42.33, Note 9.1.

[62] *Id.*

[63] United Nations Development Programme, "Human Development Indicators 2003—Bangladesh" at *www.undp.org/hdr2003/indicator/cty_f_BGD.html.*

[64] *Matter of A–*, 19 I&N Dec. 867 (Comm. 1988).

[65] INA §212(a)(B)(v).

[66] INA §241(i); Legal Immigration and Family Equity Act of 2000, Pub. L. No. 106-553, 114 Stat. 2762 (LIFE Act).

ment of status. However, those who have acquired 245(i) protection and have been grandfathered in by filing a timely labor certification or an immigrant petition may still jump the visa queue and adjust status with a winning diversity lottery ticket.[67]

Furthermore, the ameliorative provisions of INA §245(k), which allows employment-based nonimmigrants who have been out-of-status or who have engaged in unauthorized employment for less than six months to adjust status in the United States, do not apply to DV applicants.

Disruption of Current Nonimmigrant Status or Undocumented Status Resulting in Deportation

Students or visitors who are selected for the lottery must be especially careful in their strategy for acquiring permanent resident status. Long delays in scheduling adjustment interviews at most USCIS district offices or waiting for security clearances result in visa number exhaustion. When applicants finally attend their interviews, they are shocked to find that there are no visas left. Adjustment of status applicants are even more surprised to find themselves in deportation proceedings as their tourist visas have expired. Students are surprised to discover that their nonimmigrant intent has been destroyed and they are unable to apply for new visas abroad because of their expression of immigrant intent by applying for lottery green cards. This results in disruption of the student's U.S. educational program.

ADVISABILITY FOR ENTERING THE DV PROGRAM

In most cases, the benefit of a successful winning application will outweigh other risks. For many who do not qualify for an employment- or family-based petition, this would be their only chance of immigrating. For applicants in slow-moving job or family-preference categories, the benefits are obvious.

A decision to enter the DV program should nonetheless be an informed and careful choice. DOS has held that a lottery application is an expression of interest in immigrating to the United States. Also it was determined during the predecessor OP-1 lottery program[68] that the entry is a "petition" within the terms of the INA.[69] Clients should be counseled to disclose lottery participation on applications, which request information as to whether an immigrant visa petition has been submitted and that this information may result in a visa denial pursuant to INA §214(b). Too many people view the lottery application as a simple matter not worthy of disclosure in another application. Given the stakes, certain persons may not wish to risk applying for a lottery, in which only a small chance of winning is weighed against the necessity of obtaining student visas necessary to complete a program, particularly if travel or an extension of stay is required.

Many "winners" who lost the race will now experience difficulty obtaining student and visitor nonimmigrant visas and may not even be able to enter the United States. Having made advanced efforts to become a permanent resident, they have expressed clear immigrant intent and may not be able overcome INA §214(b), which requires unrelinquished domicile abroad. For example, a former F-1 student from Iran who chose to consular process in Abu Dhabi may now be unable to obtain a F-1 student visa to return the United States to resume his or her course of studies. This same problem arises for applicants who were unable to adjust status before September 30, 2003. Such individuals are placed in removal proceedings if they failed to maintain underlying lawful nonimmigrant status.

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[67] "USCIS Guidance Memorandum on 245(i)", *posted on* AILA InfoNet Doc. 05031468.

[68] The current DV program has evolved from a number of politically motivated, agenda-specific "give-away" programs. The NP-5 lottery program and its progeny—the OP-1 and AA-1 lottery programs—were piecemeal programs created specifically to manipulate the racial composition of the new immigrant population by encouraging more Caucasian immigrants. The NP-5 program was created under §314 of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (partially codified in scattered sections of the INA) (IRCA). This temporary program provided for an extra 5,000 immigrant visas per year for two years to natives of 36 countries, who were disadvantaged by the current family and employment preference system. The NP-5 program drew over one million applicants. In 1988, Congress extended the NP-5 program for another two years and increased the number of visas to 15,000 per year. In addition, Congress also created the OP-1 lottery program which provided 10,000 additional immigrant visas per fiscal year 1990 and 1991 to continue the commitment to diversify the immigrant population. The transitional AA-1 lottery program provided 40,000 immigrant visas for fiscal years 1992 to 1994 to natives of 37 under-represented countries. Furthermore, 40 percent (16,000) of the AA-1 visas were specifically reserved for natives of Ireland.

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[69] DOS Cable, 89 State 06119 (Feb. 27, 1989), *reprinted in* 66 *Interpreter Releases* 253 (Mar. 6, 1989).

Form DS-156, Nonimmigrant Visa Application, asks, "Has anyone ever filed an immigrant visa petition on your behalf?" DOS has determined that for lottery applicants, the correct answer to this question is "yes."[70]

Failure to review Form DS-156 carefully may have serious consequences for the unwary applicant and the uninformed practitioner. Although the question should not affect H and L applicants due to the doctrine of dual intent, as well as O and E applicants, a perceived desire to reside permanently in the United States may result in the refusal of issuance of the visa for B-1/B-2, H-3, and J-1 applicants.[71]

According to H. Edward Odom's directive, "the fact that an alien has registered for the visa lottery may be taken into account (just as any other fact may be) by a consular officer when adjudicating a subsequent non-immigrant visa application. However, the Visa Office is of the opinion that the fact of registration, by itself, would not ordinarily be sufficient cause for visa denial and certainly is not an automatic bar to receipt of a subsequent nonimmigrant visa(s)."[72] Also, although a lottery applicant is not automatically barred from issuance of a nonimmigrant visa where INA §214(b) applies, nor automatically prohibited from changing status to such a nonimmigrant visa or status, the willful misrepresentation of this fact before a consular officer or immigration official, if combined with other factors so that it becomes material, could be grounds for refusal of a visa.

In a typical nonimmigrant visa application, a consular officer may give little or no weight to a lottery application, whereas an approved Form I-140 or Form I-130 immigrant petition may lend stricter scrutiny to the question of nonimmigrant intent. If, however, the applicant has been registered as a "winner" by the State Department, this will demonstrate a higher degree of immigrant intent and foreclose many nonimmigrant visa options.

This issue also arises when applying for a change of status or extension of stay in a visa category where nonimmigrant intent is an issue. Form I-539, Application to Extend/Change Nonimmigrant Status at Part 4(a) and (b) requests the following information: (a) Are you or any other person included in this application, an applicant for an immigrant visa? (b) Has an immigrant petition ever been filed for you, or for any other person included in this application? The immigration practitioner should keep in mind that an F-1 student may file a number of these applications throughout a long academic history if he or she changes from an English as a second language program to a bachelor's degree program to a graduate school program, and finally to a practical training program.

Diversity visa participants should also be aware that DOS no longer shreds unused and/or unselected diversity lottery applications. On September 12, 2002, Representative George Gekas (R-PA), Chairman of the House Judiciary Committee's Subcommittee on Immigration, Border Security, and Claims, announced that upon his suggestion, the ten to thirteen million diversity visa applications will be shared with U.S. law enforcement and intelligence agencies.[73] The Diversity Visa program, which had once given hope to vast hordes of wishful immigrants both in the United States and abroad, may now become a security trap. Having the name, date, country of birth, and address of the 10 to 13 million applicants would hardly appear useful to intelligence agencies, but may be useful to an agency searching for current addresses of the several hundred thousand people ordered removed or who have overstayed their visas. After 15 years of visa lotteries, the present government's attitude towards immigrants has made it necessary to recommend caution to persons entering the Diversity Visa lottery who may be out of status or otherwise removable.

CONCLUSION

The Diversity Visa program draws the largest pool of immigration applicants every year precisely because of its apparent simplicity and ease of application. For many people wishing to achieve the dream of living in America, the DV program offers the only chance for hope. However, the program is fraught with ill-defined rules requiring counsel to have an intimate knowledge of strategies and regulations and

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[70] Letter from H. Edward Odom, Chief of Legislation and Regulations Division, Directorate for Visa Services, to Stephen Yale-Loehr, Esq., (Nov. 12, 1997), *reprinted in* 75 *Interpreter Releases* App. VI (Mar. 16, 1998) (hereinafter Letter from H. Odom to S. Yale-Loehr).

[71] For an in-depth study on nonimmigrant visa processing, see T. Walsh and B. Wolfsdorf, "Consular Processing: Practice Tips For the Unwary Practitioner in the Post IIRAIRA Era," 20 *Immigration Law Today* 193 (Apr. 2001).

[72] *See* Letter from H. Odom to S. Yale-Loehr, *supra* note 63.

[73] 79 *Interpreter Releases* 1395–96 (Sept. 16, 2002).

to pay close attention to the potential legal vulnerabilities of applicants. Failure to advise can adversely affect applicants both at the initial petition stage and even more so during the adjustment of status or immigrant visa processing. Applicants spend substantial time and money preparing for and traveling to their interviews and undergoing medical exams only to be terribly disappointed. Furthermore, if they are not issued immigrant visas, some may have their student and/or visitor's visas cancelled for possessing "immigrant intent" and may not be eligible for future visas because they had expressed an intent to immigrate. Now more than ever, DV applicants must be advised of the risks and potential legal vulnerabilities. Knowledgeable counsel can ensure that applications meet the rigorous criteria and, if selected, enhance ultimate success for any DV winner.