



Immigration Law Tampa Bay

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FORUM SHOPPING

This is a recurring issue with practitioners, especially in the E-Visa arena. Oftentimes, especially newer practitioners, are unsure as to WHERE to properly submit their application for their client.

Over the many years of E-Visa practice, “standard practices” have become established, which as a whole, do not change very often, excepting some minor shifts in daily practice by the occasional consular post.

Leaving ASIDE the USCIS-based filings IN THE UNITED STATES, by a “Change of Status” (COS) or an “Extension of Status” (EOS), let’s focus on the CONSULAR application submission.

You have to distinguish between when a Consular Post MUST, SHOULD, or MAY take a case. But don’t worry, the analysis is fairly easy.

MANDATORY JURISDICTION:

This happens when a Citizen of Country “X” also resides in that same country (“X”) and wants to apply at the nearest appropriate U.S. Consulate (oftentimes there may be only 1, sometimes more than 1).

Example: Citizen of ITALY wants to apply for E-Visa at the responsible U.S. Consulate IN ITALY. This consulate MUST accept his/her application for adjudication.

(NOTE: NOT ALL consulates within a jurisdiction may handle a certain visa type!! Check their mandates online on their site! → Examples: Germany, Italy, Canada, etc. countries where there are multiple U.S. Consulates!)

SEMI-MANDATORY / SEMI-DISCRETIONARY JURISDICTION:

This happens when a Citizen of Country “X” does NOT mainly live in “X”, but instead resides predominantly (or totally) in Country “Y”. In these cases, the consular Post in “Y” OUGHT to accept his/her case, because that is where the jurisdiction SHOULD attach. Oftentimes, local consulates in “Y” may request proof of the applicant’s legal residency status there or at least request proof of domicile there.

Example: Citizen of GERMANY wants to apply for E-Visa at the U.S. Consulate in SPAIN (Madrid), because the applicant now lives full-time in SPAIN, and NOT in GERMANY. In this case, the applicant is still a GERMAN citizen, but under EU rules can legally reside in SPAIN. The U.S. consulate in MADRID (Spain) would be ok to accept this E-Visa application there, and NOT force submission to the Post in Frankfurt, Germany.

TOTALLY DISCRETIONARY JURISDICTION:

This happens mostly in so-called “Third Country National” (TCN) situations, where the applicant is TEMPORARILY in a third country, in which he/she does NOT normally reside/live/work, etc. but is there on a very temporary basis, perhaps even only to submit a visa application, for reasons of convenience, safety, expedience, cost, etc.

In these situations, you as the lawyer need to proactively contact the Consular Post in question, explain the situation and ASK FOR PERMISSION to submit an E-Visa application there for consideration / adjudication. In these situations, the consulate is under NO OBLIGATION to accept the case, but may do so at its SOLE DISCRETION. So it can either refuse to accept your case, and you need to submit it elsewhere, or they can be nice and accommodate your request.

In my experience, these posts most often agree in situations where (1) it’s generally an EXTENSION/RENEWAL of the SAME type of visa as opposed to a First-Time application, AND (2) where the applicant is generally from a “safe” country where possible indications of fraud, security risk, etc. are LOW.

As a practitioner, when I encounter a TCN-type situation, it is best to really drill down on WHY the client “CANNOT” (or will not?) go back to either

his/her HOME COUNTRY (same as his/her nationality), or the foreign country in which they NORMALLY RESIDE (outside the U.S.).

We, as practitioners, need to use good judgment and educate the client that often “mere inconvenience” (ie. Laziness) is often a POOR reason to request TCN-processing and could likely lead to a consulate refusing to take the case.

The more compelling the reason(s) for NOT going where they normally “SHOULD” go, the better your chances of finding a willing post.

Once You have determined that an appropriate TCN-situation exists, you should proactively contact 3-5 different consular posts, where the client COULD attend to, stay temporarily, go to the in-person visa interview, and remain after the interview until passport has been returned with visa(s) and the travel to the U.S. can then take place.

Some posts will say “yes”, while others may say “no”.

IMPORTANT PRACTICE POINTER #1:

Just because a Consular post HAS accepted certain cases for TCN-processing in the PAST, DOES NOT mean it currently continues to do so!! Do not fall into the trap of “assuming” it’s still ok. ALWAYS CHECK BEFORE SUBMITTING your client’s file there, or G*d forbid, sending the client there with the application! (only to then be refused, and possibly “stuck” there).

The same is true for posts that have in the past had a strong stance against TCN-processing. This can also change, without notice. As of fairly recently, the Consular Post in TORONTO began accepting more TCN cases than they have in years past.

IMPORTANT PRACTICE POINTER #2:

If a post accepts a TCN case, and the post is NOT a regular E-Visa processing post, because the host-country is NOT a treaty country, they may not have set rules in place in terms of submission, processing and handling the application, but will instead have to “wing” it, because they do not see these often. Be patient with them, and do an extra good job clearly structuring the case.