and Immigration Services

Questions and Answers

USCIS American Immigration Lawyers Association (AILA) Meeting, April 7, 2011

I. AILA Introduction

AILA welcomes the extensive outreach USCIS conducts and the wide range of opportunities to provide input it makes available to the served public, including outreach through various national and local stakeholder events and activities, posting for comment of policy documents on the USCIS website, and the establishment of community relations and public engagement offices in each USCIS location. We appreciate the opportunity to continue to meet with USCIS in the liaison setting in order to more thoroughly discuss issues of mutual concern.

II. Questions and Answers

1. Policy Driving Adjudications

Many AILA members and other stakeholders consider the current employment benefit adjudications environment to be the most difficult and challenging experienced in decades. Employers cannot rely on prior adjudications when seeking extensions for key nonimmigrant employees; companies from abroad are finding it increasingly difficult to establish operations in the U.S. and to transfer in key managers and specialists; owner-entrepreneurs are encountering frequently-insurmountable objections and denials of visa petitions, preventing them from establishing and growing new companies in the U.S.; and investors are finding the EB-5 program risky.

We are concerned that the unpredictability in adjudications, what many view as unwelcoming adjudications, and stricter adjudication standards, especially as applied to small businesses, are contributing to an environment that is discouraging foreign companies from coming here. Additionally, AILA worries that this approach is also preventing U.S. companies from recruiting and retaining key executives, managers, specialists, and experts who are needed to keep U.S. companies competitive in the worldwide market, spur economic growth in the U.S., and create jobs for American workers.

Please describe the policy considerations that are driving adjudications at this time.

Response: USCIS is committed to the fair and equitable application of the law and regulations. USCIS stresses to adjudicators that each case must be adjudicated on its merits based on the relevant sections of the law and the record presented. Petitioner are encouraged to fully document each case including extensions given the fact that adjudicators do not have access to the previous case record.

AILA InfoNet Doc. No. 11040735. (Posted 04/07/11)

Beginning in 2010, USCIS embarked upon a comprehensive policy review. During the course of the review process, we have identified areas where additional policy or operational guidance is needed or disparate interpretations exist requiring further clarification. USCIS has sought stakeholder input through the posting of draft and interim policy memos. In addition, Service Center Operations launched the first phase of the RFE Project which included a review of agency templates and policies for the following non-immigrant visa classifications: O, P,Q as well as immigrant E-11. This review revealed the need for additional clarifying guidance primarily in the O and P classifications to ensure consistency between the sister centers. Additionally, a Ninth Circuit decision focused on the EB-11 classification shaped the drafting of template RFEs. USCIS posted all relevant templates as well as policy guidance along with FAQs in an effort to clarify policy changes for impacted stakeholders. To further support this project, national training was developed and provided to our adjudication staff to promote quality and consistency.

USCIS anticipates completion of the first phase of this multi-year project within the next few months and is in the process of identifying appropriate forms or visa classifications for the second phase of review.

2. *Kazarian* Guidance

AILA is compelled to reiterate deep concerns in regard to USCIS' new *Kazarian* guidance memo[1] and companion E-1-1 RFE Template (AILA Doc. Nos. 11020231/11012168).[2]

AILA believes that the guidance in the *Kazarian* policy memo is insufficient and falls short of the goal of providing examiners with sufficient analytical tools to properly weigh and evaluate evidence in support of EB-1-1, EB-1-2, and EB-2 "exceptional ability" petitions. Unfortunately, in its current form, the *Kazarian* memorandum undercuts the authority of DHS' own regulatory criteria, rendering those criteria as mere "tickets in the door" and subordinating them to an undefined final merits determination. The subordination of objective regulatory criteria to a subjective undefined merits determination thwarts efforts to achieve transparency, consistency, predictability, and, ultimately, due process and fundamental fairness.

The memo cites *Kazarian* without discussing at all the other on-point federal court decisions. As articulated in AILA's comments to the *Kazarian* guidance (attached as an addendum), the *Kazarian* court favorably cited several prior decisions with respect to the adjudication of extraordinary ability petitions, including *Buletini v. INS*, 860 F.Supp. 1222 (E.D. Mich.1994), *Grimson v. INS*, 934 F.Supp. 965, 969 (N.D. Ill. 1996), and *Muni v. INS*, 891 F.Supp. 440 (N.D. Ill.1995) (AILA Doc. No. 10090733).

By not describing and discussing holdings of other courts that have addressed issues presented in the adjudication of petitions in the subject categories, the *Kazarian* memo fails to articulate any useful legal standard for the final merits analysis, resulting in the exact type of circular reasoning consistently rejected by federal courts.

[1] http://www.uscis.gov/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf

[2] http://www.uscis.gov/USCIS/Outreach/Draft%20Request%20for%20Evidence%20%28RFE%29%20Template%20for%20Comment/E11_RFE_Template_1-10-11.pdf

AILA urges USCIS to revise its policy guidance, expanding on the approach to the final merits analysis discussed in detail in our comments to the *Kazarian* guidance.

Neither the *Kazarian* decision, nor the policy memo, clearly articulates how the final merits determination should be made. Cases cited favorably by *Kazarian* fill that gap. For example, in *Buletini*, the court first analyzed whether the plaintiff met three of the ten criteria enumerated in 8 C.F.R. §204.5(h)(3). Having determined that the plaintiff did provide sufficient evidence of three of the ten enumerated criteria, the court stated:

Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 C.F.R. §204.5(h)(3), the alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard.

Similarly, the courts in *Muni, Racine v. INS*, 1995 U.S. Dist. LEXIS 4336, 1995 WL 153319 (N.D. Ill. Feb. 16, 1995), and *Gulen v. Chertoff*, 2008 U.S. Dist. LEXIS 54607 (E.D. Pa. July 16, 2008), all evaluated whether the plaintiffs met at least three of the ten criteria, and held that having met the required evidentiary burden of proof, plaintiffs were eligible as aliens of extraordinary ability, absent any *evidence* indicating the contrary.

The policy memo touches upon this process in the memo's concluding paragraph in the "Part Two" analysis:

> If the USCIS officer determines that the petitioner has failed to demonstrate these requirements, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an alien of extraordinary ability under section 203(b)(1)(A) of the INA.

The absence of a discussion of the cases that provide the foundation for this analytical framework is the shortcoming to the *Kazarian* memo that undermines its effectiveness. AILA again recommends that USCIS revise the *Kazarian* memorandum to include a discussion of *Buletini, Muni, Racine, Grimson,* and *Gulen*, to provide examiners with a clear understanding, and clear examples, of the way to analyze the "second prong" of the "two-prong" test.

Response: On January 14, 2011, USCIS released a Policy Memorandum providing internal guidance for the adjudication of immigrant visa petitions based upon extraordinary ability in the sciences, arts, education, business, or athletics and for outstanding professors or researchers. This Policy Memorandum, known as the "Kazarian" memo adopts the two-part adjudicative approach to evaluating evidence set forth by the Ninth Circuit in Kazarian v. USCIS, 596 F.3d 1115 (9 Cir. 2010). On August 20, 2010, prior to the issuance of the final memo,USCIS posted an Interim Final Memo to the outreach portion of the USCIS website. Stakeholders were given until September 3, 2010, to provide comments. On September 3, 2010, the memo was removed from the website and all the comments received from the public were consolidated and taken under review by USCIS before the final version of the "Kazarian" memo was issued on January 14, 2011.

As noted in the "Kazarian" memo, USCIS agrees with the Ninth Circuit court's two-part adjudicative approach to evaluating evidence. USCIS believes that the two-part adjudicative approach to evaluating evidence described in the "Kazarian" memo simplifies the adjudicative process by eliminating piecemeal consideration of the required high level of expertise for the immigrant classification and shifts the analysis of overall high level of expertise to the end of the adjudicative process when a determination on the entire petition is made (the final merits determination). USCIS believe that the regulatory criteria are the minimum required pieces of evidence. The evidence in its totality must then establish eligibility for the required high level of expertise for the immigrant classifications.

Prior to the issuance of the Kazarian memo, USCIS officers often collapsed these two parts and evaluated the evidence at the beginning stage of the adjudicative process, with each type of evidence being evaluated individually to determine whether the individual possess the required high level of expertise for the immigrant classification they were seeking. As articulated in the Ninth Circuit decision, USCIS may have raised legitimate concerns about the significance of the evidence submitted, but those concerns should be raised in a subsequent "final merits determination."

By adopting this two-pronged approach, USCIS believes that it will lead to decisions that:

- More clearly explain how evidence was considered;
- The basis for the overall determination of eligibility (or lack thereof); and,
- Greater consistency in decisions.

USCIS has also engaged in numerous trainings of USCIS adjudicators on how to properly interpret and apply the "Kazarian" guidance. Comprehensive training by USCIS includes thorough analysis of applicable case law, regulations, and statute and also involves practicum exercises involving sample cases. As noted by AILA, prior to the issuance of the final version of the memo, USCIS added language to the Final Memo that requires officer's to not merely make general assertions, but rather officers must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the individual possess the required high level of expertise for the immigrant classification they are seeking. The burden of proof, however, continues to rest with the petitioner to establish eligibility.

As such, USCIS is confident that the memo, accompanied with the relevant templates and the thorough training of its officers provides the necessary framework for the proper adjudication of I-140 petitions covered by the "Kazarian" memo.

3. Preponderance of Evidence Training

The Citizenship and Immigration Services Ombudsman Annual Report 2010 ("Ombudsman's Report") raised concerns regarding the training ISOs receive to understand "Preponderance of the Evidence Standard" (AILA Doc. No. 10070860).[3] Specifically, the Ombudsman was concerned that "no single training module or period of time is dedicated specifically to developing adjudicator expertise in weighing evidence" and that more senior officers "developed their own sensibility regarding application of the standard." The report noted that while adjudicators can define the standard, they have not been trained to apply it. The Ombudsman suggested that USCIS develop a case format for providing guidance and training to both new and experienced adjudicators on applying the preponderance of evidence standard.

[3] http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf

In response to the Ombudsman's Report, USCIS indicated that it was developing such material as part of its policy memorandum overhaul. While we appreciate these efforts, AILA strongly believes that understanding the evidentiary standard is in and of itself an area of major concern, and one that should be addressed with more urgency.

AILA understands that an adjudicator may have difficulty in approving an application or petition when there is a real doubt. However, the "more likely than not" or "more than 50% likely" standard means that even with 49% on the "not" side of the equation, the petition should be approved. In fact, the Supreme Court recognized that something can be a real substantial doubt, and yet still, the petition should be approved. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 (1997); *U.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). While this is articulated in the AFM at Chapter 11.1(c), we share the Ombudsman's concerns that while adjudicators understand this in theory, they do not understand it in application. We respectfully request that USCIS prioritize the development and implementation of a practical training program. AILA is happy to partner on these efforts.

Response: The USCIS Training and Career Development Division (TCDD) has undertaken a review of its basic immigration officer training course curriculum, as well as initiated an analysis of training needs for journeyman level officers. We recognize that additional training on the burdens and standards of proof in benefit adjudications is ripe for inclusion in our basic training curriculum. We plan to have new materials developed, through a joint effort between TCDD, the Office of the Chief Counsel, and the Office of Policy & Strategy, for inclusion in the basic training curriculum before the end of the fiscal year.

4. Adjustment of Status for Alien Immediate Relatives Admitted Under the Visa Waiver Program

AILA is concerned that USCIS has not yet provided guidance to the field with respect to the eligibility of an alien who was admitted under the Visa Waiver Program ("VWP") to adjust status as an immediate relative under INA § 245 at any time prior to the removal of the alien under INA § 217. Several USCIS District Offices are holding in abeyance immediate relative adjustment of status applications by applicants who entered under the Visa Waiver Program and whose VWP 90-day admission expired prior to the filing of the Form I-485, and at least one district is intending to deny such applications (AILA Doc. No. 11028150).[4]

The Solicitor General has acknowledged the adjustment eligibility of an alien admitted under the VWP in a brief in opposition to certiorari filed in *Bradley v. Holder*, Case No. 10-397 (AILA Doc. No. 10122752).[5] In the brief, the Solicitor General acknowledged at page 9:

> In general, VWP aliens are excepted from eligibility to seek adjustment of status, but those who qualify as immediate relatives fall within an exception to the exception. See 8 U.S.C. 1255(c)(4). **Immediate relatives therefore are subject to the general rule that DHS *may* grant adjustment of status, "in [its] discretion and under such regulations as [it] may prescribe." 8 U.S.C. 1255(a).** But nothing in that general rule, or in Section 1255(c)(4),

[4] See "Questions and Answers from the San Diego USCIS – AILA Liaison Meeting, January 11, 2011," available at http://www.aila.org/content/default.aspx?docid=34522

[5] http://www.justice.gov/osg/briefs/2010/0responses/2010-0397.resp.pdf

> provides that VWP aliens who are immediate relatives must be able to seek adjustment of status *in removal proceedings*. To the contrary, **as the court of appeals explained, VWP aliens have waived any opportunity to use adjustment of status, or any ground except an application for asylum, to challenge removal**. Pet. App. 15a (citing *Bayo*, 593 F.3d. at 507). (Emphasis added).

In this brief, the Department of Justice confirms that USCIS may continue its longstanding policy of adjudicating applications to adjust status for immediate relatives who have entered and overstayed a VWP admission, and those applications may be approved in its discretion.

Notably, the opinions of the Solicitor General, when made to the United States Supreme Court, are the position of the United States. In his brief to the Supreme Court, the Solicitor General synthesized the rules of law from the different courts of appeal decisions such as *Bradley v. Attorney General*, — F.3d –, 2010 WL 1610597 (CA3 April 22, 2010); *McCarthy v. Mukasey*, 555 F.3d 459 (CA5 2009); *Nose v. Attorney General of the U.S.*, 993 F2d 75 (CA5 1993); *Lacey v. Gonzales*, 499 F.3d 514 (6th Cir. 2007); *Bayo v. Napolitano*, 593 F.3d 495 (CA7 2010) (en banc); *Lang v. Napolitano*, 596 F.3d 426 (CA8 2010); *Zine v. Mukasey*, 517 F.3d 535 (CA8 2008); *Freeman v. Gonzales*, 444 F.3d 1031 (CA9 2006); *Momeni v. Chertoff*, 521 F.3d 1094 (CA9 2008); *Ferry v. Gonzales*, 457 F.3d at 1117 (CA10 2006); and *Schmitt v. Maurer*, 451 F.3d 1092 (CA10 2006).

Central to several of the cases is that the aliens in each were attempting to interpose adjustment of status as a defense to removal. The courts found that they waived the right to do so by gaining admission under the VWP. While we are aware that courts in *McCarthy, Momeni*, and *Bayo* state that VWP aliens who overstay their 90-day periods of admission are ineligible to adjust, those pronouncements were outside the scope of issues before those courts.

Moreover, courts in *McCarthy, Momeni*, and *Ferry*, state that VWP aliens only forego the right to contest removal through adjustment, not the right to adjustment through proceedings before USCIS, even when filing for adjustment after the expiration of the 90-day period. In *McCarthy*, the court says: "The Sixth, Eighth, and Tenth Circuits have also concluded that aliens who file for an adjustment of status after the expiration of the ninety-day period *waive their right to contest a subsequent removal order*." (Italics added.) The Ninth Circuit in *Momeni* holds: "An alien who comes to the United States under the Visa Waiver Program generally cannot avoid his or her *waiver of the right to contest removal* (other than on the basis of asylum)." (Italics added.) Similarly, the *Ferry* court says: "It is evident under the applicable statutes and regulations that a VWP alien who overstays his authorized time and is ordered removed has *waived his right to contest that removal* through an application for adjustment of status." (Italics added.) Each is silent as to eligibility to adjust administratively before the USCIS. That is as it should be.

AILA requests that USCIS immediately provide guidance to the field clarifying that an alien admitted under the Visa Waiver Program may adjust status as an immediate relative notwithstanding the filing of the Form I-485 adjustment application after the expiration of the VWP alien's period of admission.

Response: All field offices have been instructed to adjudicate I-485 applications filed by individuals who last entered the U.S. under the Visa Waiver Program (VWP) and overstayed on their merits UNLESS the potential beneficiary is the subject of an INA section 217 removal order. Additionally, field offices have been instructed to hold in abeyance all VWP adjustment applications for potential beneficiaries who have

been ordered removed under INA section 217. We are drafting final guidance including an AFM update on this topic we expect to issue soon.

5. Aliens Eligible for H-1B Portability Under INA §214(n)(2) [Section 105 of AC21]

Under the "portability" provisions of INA §214(n)(2), an applicant for H-1B status may begin working for the sponsoring employer immediately upon the filing of the Form I-129 Petition for Alien Worker, provided that the applicant is a "nonimmigrant" and "was previously issued a visa or otherwise provided nonimmigrant status under § 101(1)(15)(H)(i)(b)." However, recent USCIS guidance with respect to the verification of employment authorization through E-Verify suggests that "nonimmigrant" refers only to aliens currently in H-1B status or pending H-1B extensions. This position is in conflict with the plain meaning of the statute, which extends H-1B portability to any nonimmigrant that *previously* held H-1B status.

In relevant part, INA §214(n) states that a "nonimmigrant alien…who was previously issued a visa or otherwise provided nonimmigrant status under § 101(1)(15)(H)(i)(b)" is eligible to accept new employment upon the filing of a new I-129 for H-1B status. INA §214(n)(2) defines "nonimmigrant" as an alien:

> (A) who has been lawfully admitted into the United States;
>
> (B) on whose behalf an employer has filed a non-frivolous petition for new employment before the date of expiration of the period of stay authorized by the Attorney General; and
>
> (C) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition.

It is not uncommon for an alien to enter the U.S. in H-1B status, to later switch to a different nonimmigrant status, such as H-4 or F-1, and later still seek H-1B status as the beneficiary of a new I-129 petition. For employers of such aliens, H-1B portability under INA §214(n) permitted the alien beneficiaries to commence employment with the petitioning employer upon filing of the petition.

E-Verify employers, however, have been confronted with the receipt of "tentative non-confirmations" and then "final non-confirmations" for certain employees working pursuant to H-1B portability. Specifically, the final non-confirmations occurred for individuals with pending H-1B petitions who are changing status from H-4 classification. In response to reports of these seemingly erroneous non-confirmations, AILA's Verification Committee engaged E-Verify on this issue. AILA was informed that these final non-confirmations were based on internal guidance from the USCIS Chief Counsel's office. This guidance has not been released to the public.

Under the plain meaning of INA §214(n), such beneficiaries should be able to work for their new employers immediately upon the filing of the I-129 H-1B petition. The statute nowhere requires a nonimmigrant alien to maintain H-1B status to be eligible for portability; it merely requires that the foreign national previously held either an H-1B visa or H-1B status, and remains in a period of stay authorized by the Attorney General. Please provide the basis of USCIS' new interpretation.

Response: This is not a new interpretation. H-1B portability pursuant to AC21 §105 applies to nonimmigrants who are currently in H-1B status or an authorized period of stay based on a timely filed extension of an H-1B status petition. USCIS interprets INA §214(n) as allowing nonimmigrants who are

currently in H-1B status, or who are in a period of authorized stay as a result of a pending H-1B extension petition, to begin employment upon the filing by the prospective employer of a new non-frivolous H-1B petition on the alien's behalf. H-1B portability does not apply to a nonimmigrant who is in a valid status other than H-1B. Page 10 of Senate Report 106-260 regarding AC21 states the following under the topic of *Increased Portability of H-1B Status*: "[t]he bill allows an *H-1B visa holder* to change employers at the time a new employer files the initial paperwork, rather than requiring the visa holder to wait for the new H-1B application to be approved (emphasis added)." In addition, INA 214(n) is titled "increased portability of *H-1B status*."

6. Implementation of the Validation Instrument for Business Enterprise (VIBE)

AILA reiterates the importance of providing AILA and other stakeholders an opportunity to discuss this program with USCIS during its beta testing. We continue to have concerns regarding the reliability of, and reliance on, the Dun & Bradstreet database.

Members have begun to receive "VIBE-based" RFEs that cause members concern about the reliability of the source information relied on by the VIBE program. VIBE is failing to verify established employers, and RFEs frame VIBE's inability to verify in a way that fails to provide petitioners with specific information on perceived insufficiencies, and which make it sound as though the failure of VIBE to verify a petitioner's existence is the fault of the petitioner. Several RFEs issued recently state:

> "VIBE has indicated missing or contradictory information that requires additional evidence to establish your company or organization's eligibility."

We respectfully submit that the RFE should state "Dun & Bradstreet has not been able to confirm the following information..." and then list the specific information that cannot be confirmed, or "Dun and Bradstreet has provided the following information, which is not consistent with information you have provided in the petition:..." Then, USCIS should specifically identify the information provided by D & B and explain how it is inconsistent. The failure of Dun & Bradstreet to provide accurate information is not an excuse for a "fishing expedition," and a VIBE RFE should only be issued where there is no independent evidence of the petitioner's existence (annual report, articles of corporation, charter, business license, annual report, etc.) or conduct of business (business license, occupation permit, website, brochures, etc.).

Response: Officers have been instructed that the information contained in VIBE should be reviewed in conjunction with the evidence submitted with the petition. They have been trained to not rely solely on information found in VIBE. It is anticipated that VIBE will help reduce the frequency of RFEs as officers become more familiar with the system.

Officers are required to specifically state the issue found in VIBE that is problematic, derogatory, or contradictory. For example:

- If VIBE could not find a match for the company, we state:
  The information you provided about your company/organization's name and address is insufficient for USCIS to match your company/organization to information in USCIS's VIBE.

- If VIBE indicates that the company is an inactive business, we state:
  USCIS's VIBE indicates that your company/organization is inactive and may be out of business.

SCOPS encourages all stakeholders to send specific examples of RFEs that are confusing or problematic to VIBE-Feedback@dhs.gov. SCOPS continues to work with the centers in the RFE working group and will make modifications, if necessary.

7. Administrative Appeals Office

A. Submitting Amicus Briefs

At our October 2010 meeting and during the AAO Stakeholder call, AAO indicated that a proposed regulation would be forthcoming that will include a formal process for submitting amicus briefs, as well as streamline the appeals process (AILA Doc. No. 10111731).[6] Please provide an update on when the proposed AAO regulation will be published for public comment.

Response: We are currently working to finalize the draft regulation and anticipate publication for public comment.

B. Increase in Staff

AILA members were pleased to learn at the October 2010 meeting that the AAO expects to add 15 new staff in FY2011. Please provide a status update on hiring new staff to date and whether AAO still expects to have 15 new staff on board and trained by summer 2011.

Response: We believe we are on schedule to bring the new adjudicators on board and have them trained and working on decisions before the end of the 2011 fiscal year.

C. Reporting AAO Adjudication Statistics

During the AAO Stakeholder call, AAO Chief Perry Rhew indicated that the AAO is unable to report on its adjudication statistics, as DHS adjudication statistics are the responsibility of the Office of Immigration Statistics (AILA Doc. No. 10082631).[7] The AAO is not currently included in the purview of USCIS offices/centers for which the Office of Immigration Statistics provides data. Will the Office of Immigration Statistics include the AAO in future statistical review? What is the mechanism for making this request?

Response: The USCIS Office of Performance and Quality (OPQ) is the official source of USCIS operational data, collaborating with the DHS Office of Immigration Statistics (OIS) for reporting at the Department level. At this time, OPQ does not collect adjudication statistics from the AAO. However, AAO will begin to report to the Enterprise Performance Analysis System (ePAS), set to deploy in the near future. As a corporate standard, OPQ will collect approximately six months of data prior to publishing official statistics for programs and directorates with newly reported data.

[6] http://www.uscis.gov/USCIS/Outreach/Public%20Engagement/National%20Engagement%20Pages/2010%20Events/October%202010/AILA_QandA_Summary.pdf

[7] http://www.uscis.gov/USCIS/Outreach/Public%20Engagement/National%20Engagement%20Pages/2010%20Events/October%202010/AAO%20Stakeholder%20Engagement_Executive%20Summary.pdf

D. Filing a Second I-140 While First I-140 Is Pending with the AAO

During the AAO Stakeholder call, AAO Chief Rhew confirmed that current USCIS policy is to hold a newly filed I-140 in abeyance while an I-140 in the same classification is pending on appeal.

Response: This action has been adopted to ensure that the agency's decision on a petition will be consistent regardless of the number of petitions filed by the employer for a particular beneficiary. It would also be an unnecessary use of agency resources to continue processing the appeal to finality if a subsequently filed petition were already approved.

AILA raises the following concerns:

I. I-140 Petitions filed on behalf of Aliens of Extraordinary Ability, Outstanding Researchers/Professors and National Interest Waivers. These classifications only consider the beneficiaries' achievements as of the priority date. If an I-140 is pending 4 to 6 months, denied, and on appeal for another these new achievements can only be considered via a new petition. Therefore, the applicant will be forced to choose between an appeal based on prior accomplishments or a new petition. year, it is quite possible that the beneficiary will have acquired new achievements. However,

Response: USCIS/INS has long held that eligibility for the classification sought must be established as of the priority date of the petition. See *Matter of Katigbak,* 14 I&N Dec. 45 (Reg, Comm., 1971). The policy ensures fairness in the visa issuing process as it prevents an unqualified beneficiary from obtaining a visa number ahead of another beneficiary. It also prevents a petitioner from establishing eligibility based on the beneficiary's prospective accomplishments. Therefore, eligibility must be established at the time of filing.

II. I-140 Petitions filed based on a Labor Certification. If an I-140 based on a Labor Certification is approved, the beneficiary is allowed to keep the priority date of the Labor Certification. If the beneficiary obtains a second Labor Certification and wishes to file a new I-140, the I-140 must be filed within 180 days of certification of the second Labor Certification. In situations where the first I-140 is on appeal, would AAO consider a mechanism to expedite the appeal?

Response: The AAO has not considered a special carve-out exception for this scenario, but is always willing to consider mechanisms to make case processing more efficient. We receive dozens of requests for expedited processing each month and attempt to consider each request on a case by case basis.

E. Copy of Record

During the AAO Stakeholder call, AAO Chief Rhew indicated a willingness to consider expanding the availability of AAO files under certain circumstances, e.g., when the current attorney of record on an appeal was not the attorney for the duration of the case, the current attorney may not have all of the information that was filed with the appeal or contained in the record. Please confirm whether the AAO will determine a process for making such a request.

Response: The AAO is consulting with USCIS leadership on expanding availability of the records in a given file. Any process would need to follow overall USCIS guidance.

8. Holding in Abeyance Certain Adjustment of Status Denials

Applicants for an I-601 waiver have the right to direct appeal. However, only the field office's decision on the I-601 waiver is appealed, not the underlying adjustment application (which has no right of direct appeal). While the denial of the adjustment of status is premised on the fact that the waiver has been denied, the waiver denial is a not a final denial. Therefore, it seems legally prudent that the underlying I-485 remain open and pending while the AAO appeal is pending.

AILA respectfully requests that the underlying adjustment application *not* be denied, but rather, remain pending and held in abeyance while the appeal of the waiver is pending at the AAO. This will allow applicants to remain eligible for an EAD and have a right to remain in the United States while the appeal is pending.

Response: The agency has reviewed this policy and believes that a decision on the underlying Form I-485 application should be made when the Form I-601 is denied. If USCIS issues an NTA, the applicant can generally seek review of the adjustment claim before the immigration judge. 8 CFR 1245.2(a). The immigration judge has jurisdiction to adjudicate a waiver application, 8 CFR 1240.11(a)(2), even if the applicant has appealed the USCIS denial to the AAO.

9. Coordinating with EOIR and ICE Where Alien in Proceedings Asserts *Prima Facie* Eligibility for Naturalization

The regulation at 8 CFR § 1239.2(f) allows for termination of a removal case for naturalization purposes if the applicant (1) establishes prima facie eligibility for naturalization, and (2) the matter involves exceptionally appealing or humanitarian factors. In *Matter of Acosta-Hidalgo*, 24 I & N Dec. 103 (BIA 2007), the Board of Immigration Appeals ruled that an immigration judge should not terminate until he/she receives an affirmative communication from the DHS that the individual is statutorily eligible for naturalization (AILA Doc. No. 09030963).[8]

At present, there is no mechanism for this communication. In a liaison meeting between AILA and ICE on October 5, 2010, ICE stated that it would reach out to USCIS with respect to establishing such a mechanism (AILA Doc. No. 10121369). Would USCIS please provide instructions on how an alien may obtain an "affirmative communication" from DHS to EOIR regarding *prima facie* eligibility for naturalization?

Response: We will continue our discussions with ICE on this issue.

10. I-824s – Coordinating with DOS/NVC

The Ombudsman's Report also raised concerns regarding the coordination between USCIS and DOS on notifications of an approved petition or application to the National Visa Center (AILA Doc. No. 10070860).[9] There are a number of instances in which USCIS reports having sent the notification and

[8] http://www.justice.gov/eoir/vll/intdec/vol24/3555.pdf

[9] http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf

DOS reports not having received such notification. The Ombudsman's report also noted such occurrences. AILA has two questions and one additional suggestion in regard to this issue:

a. As an immediate solution, the Ombudsman recommended the use of tracked mail delivery instead of regular mail, enabling USCIS to have proof of delivery. This would not only ensure effective delivery but assist USCIS and DOS in identifying why and how transfer problems occur. USCIS responded that this would cost too much money, as well as "pose a number of [unidentified] operational and logistical issues" (AILA Doc. No. 10112460).[10] AILA supports the Ombudsman's recommendation and requests that USCIS reconsider this recommendation. It seems inconceivable that the $405.00 application fee would not effectively cover the $2.80 cost of Certified Mail.

Response: USCIS is committed to finding an effective solution to better monitor the sending and receipt of I-824 notifications to the NVC. We are currently researching commercial delivery alternatives.

b. USCIS responded to the Ombudsman's request that a) it had unsuccessfully looked into an electronic data transfer system, b) had apparently given up (due to system and encryption compatibility issues), but c) was "committed to exploring this possibility again with DOS." Please provide an update on the progress in overcoming the technical issues to develop a reliable, secure, and expeditious transfer system?

Response: There have been no enhancements to either USCIS or DOS systems since the impasse was first explained to the Ombudsman. System and encryption compatibility issues between USCIS and the NVC which continues to prevent implementation of a secure method to electronically transmit notifications. USCIS is continuing work with DOS to identify a method that will allow for immediate notification while adhering to applicable privacy laws.

As an alternate short-term solution (to the additional cost of tracked mail), USCIS and DOS could agree to a transfer notification process, where DOS would email USCIS the case numbers of cases received upon receipt at the NVC. USCIS would then have proof of actual delivery of each case.

Response: USCIS will further explore this option with DOS and USCIS Records Offices.

11. CLAIMS 3 & PIMS

Stakeholders continue to have problems with petitions not being found in PIMS. According to the KCC, when the record of a petition cannot be found in PIMS, CLAIMS 3 is checked. CLAIMS 3 should have a record of the petition, whether or not a copy was forwarded to the KCC. However, there seem to be occasions where an approved petition is not found in CLAIMS 3. We would appreciate if USCIS could develop a mechanism whereby the petitioner can request USCIS to update or verify that the petition is in CLAIMS 3. We believe that this may ameliorate many of the delays people are experiencing due to PIMS.

Response: We would appreciate if you could provide examples so that we can look into this further.

[10] http://www.uscis.gov/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Annual%20Reports/cisomb-2010-annual-report-response.pdf

12. Posted Processing Times and Delays

A. Processing Times Posted on www.uscis.gov

AILA continues to be concerned that the processing times posted on the USCIS website are not reflective of actual processing times. USCIS has advised that much of this is due to technical limitations, for example, the software and process used to collect this information are incapable of real-time reporting. However, in response to inquiries on petitions that were ONPT (outside normal processing times), NCSC reported that the "real" processing times were longer than posted processing times. Until a petition is more than 30 days beyond this "real" processing time, NCSC could not take a referral to the Service Center on the petition. For example, for at least six months, the posted processing times for I-140 petitions were stated at 4 months, whereas the actual processing time was closer to 8 months, and the posted processing times for H-1B I-129 petitions was stated to be two months, whereas the actual processing times were closer to 6 months.

Stakeholders rely on the posted processing times for planning. Inaccurate processing times and sudden great changes in processing times (from 4 months to 8 months seemingly overnight) defeat this purpose. The perception that posted processing times are so unreliable has generated third-party websites to track actual processing times for petitioners and beneficiaries (c.f., www.trackitt.com). The end result is that the public cannot trust the stated processing times on the USCIS website, thwarting one of the Service's four principles: transparency.

i. Would the Service explain the current challenges to fast and accurate processing time reporting and what efforts are being taken to overcome these challenges?

Response: USCIS is poised to begin a pilot test of a new Enterprise Performance Analysis System (ePAS) in early May that will facilitate improved data collection and reporting that ultimately will enable processing times to be published on the web that are closer to near real-time than is currently the case under the current performance system. The ePAS system will provide the agency with an automated means by which to collect, store, and report immigration application and petition production data on a daily basis. A new Standard Management Analysis Reporting Tool (SMART) is also being introduced that will provide next-day reporting capabilities of data collected by ePAS. SMART is an Oracle Business Intelligence software product that is able to be deployed throughout the USCIS enterprise to deliver increased reporting, ad hoc query and analysis capabilities, as well as expanded data sets to support development of dashboards and performance scorecards. USCIS employees will be able to access and interact with information in multiple ways, including web-based interactive dashboards, collaboration workspaces, search bars and through common Microsoft Office applications.

At this time, the OPQ collects operational data from the Service Centers and Field Offices for end-of-month reporting. This process involves each office and center submitting an end of month production report by the 8th business day of the following month. The data collected from these reports are used to calculate the processing times that are published. However, before OPQ is able to process the data received, substantial quality control audits are undertaken to ensure the reported data is accurate, reliable and complete. Once these audits are completed the OPQ publishes the final data set and calculates the processing times that

are published to the web by the 15th day of the next month making them approximately 45 days stale by the time they are officially posted.

The posted processing times reflect the Agency's processing position relative to the number of applications/petitions received from the previous reporting period. Additionally, the processing time calculations are based upon the congressionally mandated processing time goals, and reflect the relative number of applications/petitions received over the target processing time period. Thus, the processing times posted are not indicative of a literal aging report that would contain the actual age of each application and petition that is contained within the inventory of pending cases, therefore, outliers may occasionally emerge where the age of a pending cases does not align with the processing time posted on the web.

ii. We understand that Transformation will include the implementation of improved date management and reporting systems. Can USCIS confirm that one of the stated goals of Transformation is an accurate, real-time processing time reporting function?

Response: The USCIS Office of Performance and Quality (OPQ) is collaborating with the Office of Transformation Coordination (OTC) toward improved data management and reporting systems. In the interim period prior to the fully transformed environment, OPQ will deploy the Enterprise Performance Analysis System (ePAS), which will house operational data in a similar repository as Transformation. The Standard Management Analysis Reporting Tool (SMART) will facilitate next-day reporting capabilities from ePAS, and is utilizing the same technology for reporting that will be employed through Transformation. These collaborative efforts will position the agency to make a streamlined transition toward a fully transformed environment that will provide accurate and real-time processing time updates.

B. Processing Delays

During the past year processing times spiked for several types of petitions, including I-129 and I-140 petitions. To address the increase in processing times, SCOPS transferred a number of I-130 petitions CSC to TSC, only to be eventually sent back to CSC. In regard to significant I-129 backlogs, stakeholders have questioned whether USCIS introduced delays to increase Premium Processing filings (a Google search brought up several blogs with such comments). While AILA understands that this could never be agency policy, the perception thwarts the Service's principles of integrity and transparency.

i. Can USCIS please advise AILA on current efforts to return to the stated processing goals?

Response: In reference to the I-130s that were transferred back to the CSC, SCOPS immediately implemented this plan once it was determined that several thousand IR I-130s were close to or past processing times. We coordinated with the CSC, who had available resources to absorb the work at the time.

As of April 1, 2011, the status of this population of cases is:

Approved	Denied	Pending Request for Evidence	At District Office for

		/ Intent to Deny	Interview
28770	468	4362	2130

Regarding the H-1B processing time, both the California and Vermont Service Centers have been working to comply with the stated two-month processing time for H-1B petitions. Each center has trained additional officers to assist in attaining this goal. Both centers provide weekly reports to SCOPS HQ regarding these efforts. As of March 28, the CSC reported that they are at current on cap cases, at a February 6, 2011 processing date on cap exempt cases, and a March 3, 2011, processing date for EOS petitions. The VSC reported that they are current on cap cases and at a January 28, 2011 processing date for EOS petitions.

ii. Can USCIS also discuss the plans in place to effectively process I-129 petitions within stated processing goals when FY2012 H1-B petitions begin to be filed in April 2011?

Response: As mentioned above, both centers have trained additional officers to handle both the current H-1B caseload and the projected cap caseload in April.

C. Procedure For Stakeholders To Pursue When A Pending Petition Is Outside Normal Processing Times

Stakeholders remain confused as to when specific follow-up action may be taken on delayed petitions and applications. Moreover, as stated above, our members report that NCSC staff has on occasion reported a longer actual processing time than what is posted on the website, and USCIS refused to initiate an inquiry until that longer processing time had passed.

i. Can USCIS provide AILA with a clear protocol that G-28 attorneys may pursue to follow-up on delayed filings?

Response: Following is the established protocol that an accredited representative may pursue to inquire about a case if the published processing time has passed for the particular form type in question:

Step 1: Contact the National Customer Service Center (NCSC) at 1-800-375-5283. The NCSC can assist customers, community-based organizations and liaison groups with case related inquiries. Before calling the NCSC please have available your receipt number, alien registration number, type of application filed and date filed. During your call we recommend that you take note of the following information:

-The name and/or id number of the NCSC representative
-The date and time of the call
-Any service request referral number, if a service referral on a pending case is taken

Step 2: If more than **15 days have passed** since you contacted the NCSC and the issue has not been resolved or explained you can email the proper USCIS Service Center to check the status of your case.

-California Service Center: csc-ncsc-followup@dhs.gov
-Vermont Service Center: vsc.ncscfollowup@dhs.gov

-Nebraska Service Center: ncscfollowup.nsc@dhs.gov
-Texas Service Center: tsc.ncscfollowup@dhs.gov

Please note: Emails should be sent to the Service Center that has jurisdiction over your case. The receipt notice will indicate EAC for the Vermont Service Center, SRC for the Texas Service Center, LIN for the Nebraska Service Center, and WAC for the California Service Center.

When contacting the Service Centers by email you will need to provide the information outlined in Step 1. If the NCSC did not issue a service request after your call, please indicate the reason the NCSC representative did not issue the request.

Step 3: In the event you do not receive a response **within 21 days** of contacting the appropriate Service Center, you may email the USCIS Headquarters Office of Service Center Operations by email at: SCOPSSCATA@dhs.gov. You will receive a response from this email address **within ten days.**

ii. Is the August 6, 2009, *Case Status Inquiries with the Service Centers* still the protocol in effect (AILA Doc. No. 09081067)?[11] This protocol indicates that stakeholders must wait 30 days after initial contact with the NCSC before moving to the next step of e-mailing the Service Center follow up. However, at other times, USCIS indicated that stakeholders only need to wait 15 days. We would appreciate if you could clarify.

The period of waiting after the initial contact with the NCSC before moving to the next step of following up with the Service Center has been changed from 30 days to 15 days by the NCSC last year as the inquiries were being responded to in 15 days on the average.

13. Procedure to Address Erroneous RFEs or to Request Clarification

The Ombudsman's Report highlighted the need for stakeholders to have access to USCIS officials that can provide substantive answers to case specific questions (AILA Doc. No. 10070860).[12] It noted as two specific examples: 1) the need to pose a question prior to responding to an RFE and 2) the need to correct a clear service error. AILA believes that these are issues of great concern. Even with the careful vetting that the new RFE templates are receiving, there may be times when the information/documentation requested is off-point as a matter of law, or the ISO has requested information well beyond what is necessary to meet the preponderance of the evidence standard, or even that the documentation requested is in the file.

When this issue has been raised in the past, USCIS' position has been that stakeholders should do their best to respond, explain why the information/documentation is off point, overly burdensome, or unavailable. This puts stakeholders in a tenuous position, given the short timeframe provided to respond to many RFEs and the risk that the petition may be denied if the documents are not provided. Therefore, most stakeholders will err on the side of providing everything possible to address the issues raised in the RFE. This is a tremendous waste of resources, both for stakeholders and for ISOs.

[11] http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=c561767d005f2210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD

[12] http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf

AILA requests for supervisory review of all RFEs and NOIDs for substantive issues to ensure the correct burden of proof is being applied and to ensure that the time allotted for response is consistent with the 2007 Neufeld Memo *Removal of the Standardized Request for Evidence Processing Timeframe Final Rule* (AILA Doc. No. 07062171).[13]

AILA also requests that USCIS establish a quality review protocol to allow Stakeholders to obtain clarification from subject matter experts on RFEs and NOIDs within no more than 7 days of requesting such clarification.

Response: USCIS routinely conducts quality reviews on all forms and classifications at the Service Centers, including RFEs and NOIDs. Additionally, supervisors conduct quality reviews as part of the routine performance evaluation of their employees. USCIS handles millions of cases on an annual basis. While periodic reviews and "spot check" reviews currently occur, it would be resource-intensive to routinely conduct 100% RFE review on one or more product lines. Routine 100% RFE review would also impact customer service, as the customer would be waiting longer for the RFE or NOID.

Regardless, when new guidance is issued or training has occurred, USCIS may implement 100% supervisory review for a limited time to ensure that adjudicators are properly applying the new guidance or training, to include RFEs and NOIDs. Over the past year, USCIS implemented 100% supervisory review on a number of occasions to ensure the proper application of key policy and procedural memoranda, and held regular meetings and teleconferences to address any anomalies.

USCIS also believes that the RFE Project is a critical step in the goal to ensure agency integrity. USCIS is actively engaging with stakeholders to review and revise current templates used at the Service Centers. A vital part of the RFE Project is training at the centers, which is conducted in concert with the Office of the Chief Counsel (OCC).

Posing a question prior to responding to an RFE, as suggested, would essentially constitute a double RFE and would not be an efficient use of resources. Adopting this interim step would also impact customer service by lengthening the processing times and hampering the Agency's efforts to provide expedited processing where necessary. It would also generate an excessive amount of additional RFEs.

Nevertheless, processes exist for correcting clear administrative errors. For an RFE that clearly reflects a misapplication of law, or clear administrative error, e.g., wrong case, you can email the USCIS Service Center that issued the RFE, as follows:

- California Service Center: csc-ncsc-followup@dhs.gov
- Vermont Service Center: vsc.ncscfollowup@dhs.gov
- Nebraska Service Center: ncscfollowup.nsc@dhs.gov
- Texas Service Center: tsc.ncscfollowup@dhs.gov

Clearly flag the subject line with "INCORRECT RFE." In the e-mail, please include your receipt number, alien registration number (if applicable), type of application, and the date the RFE was issued. While the RFE clock will continue to run, these e-mails will processed timely under current timeframes.

At the field offices, if you receive an RFE at an interview appointment that you feel is not appropriate, please raise this with the 1st line supervisor of the officer and elevate to the FOD/DD/RD as needed. If

[13] http://www.uscis.gov/USCIS/Laws%20and%20Regulations/Memoranda/June%202007/RFEFinalRule060107.pdf

you receive an RFE via mail that you feel is not appropriate, please raise this with the FOD and elevate to the DD/RD as needed.