U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Public Engagement and Customer Service Directorate
Washington, DC 20529

U.S. Citizenship and Immigration Services

Questions and Answers

USCIS– American Immigration Lawyers Association (AILA) Meeting
October 9, 2012

Overview

On October 9, 2012, USCIS hosted an engagement with AILA representatives. USCIS discussed issues related to waivers of inadmissibility, NSEERS, H-1B Visa Cap Registration, the Entrepreneurs in Residence Program, as well as other issues. The information below provides a review of the questions solicited by AILA and the responses provided by USCIS.

Stateside Waivers of Inadmissibility for Certain Immediate Relatives of U.S. Citizens

Question 1a: What is the status of the USCIS review of the comments received in connection with stateside Waivers of Inadmissibility for certain immediate relatives of U.S. citizens?
Response: USCIS has received and reviewed all the comments received in connection with the Proposed Rule on Provisional Unlawful Presence Waivers. USCIS and DHS are working on a final rule for publication in the Federal Register.

Question 1b: What is the anticipated timeline for implementation of this program?
Response: The final rule is expected to be published in the Federal Register by the end of this calendar year.

Question 1c: What steps is the Service taking to ensure that provisional waivers are consistently adjudicated to the same standards now being used for centralized filing of waivers?
Response: USCIS is preparing field guidance and will conduct training for personnel who will be adjudicating the provisional unlawful presence waivers. The standards used for adjudicating the provisional unlawful presence waivers will parallel the standards now being used for the centralized Form I-601 waivers. USCIS also will update the existing training programs to more precisely address adjudication issues specific to the provisional unlawful presence waiver process.

NSEERS

USCIS is currently holding cases in which it appears that the applicant has violated the National Security Entry-Exit Registration System (NSEERS) registration requirement. On April 27, 2011, the Department of Homeland Security announced the removal of the list of countries whose nationals have been subject to registration under NSEERS (AILA Doc. No. 11042769).[1] On April 16, 2012, USCIS released a memorandum providing guidance on individuals previously subject to NSEERS and it was our

[1] *Schlanger Memo on the Elimination of NSEERS Country Designations*, AILA Doc. No. 11042769, http://www.aila.org/content/default.aspx?docid=35229

understanding that additional guidance was scheduled to be issued in June 2012 (AILA Doc. No. 12042661).[2]

Question 2a: What is the status of the USCIS guidance on how to process cases in which the applicants were subject to NSEERS, but did not register?
Response: USCIS has issued revised guidance on NSEERS consistent with the DHS policy.

Question 2b: Upon issuance of this guidance, what steps will applicants with pending petitions/applications need to take with USCIS to ensure the petition/application will be processed or will USCIS affirmatively return such pending petitions/applications to the adjudications queue for processing?
Response: USCIS will automatically process these applications and petitions. No action is needed on the part of the applicant or petitioner.

H-1B Visa Cap Registration

Question 3: Please provide an update on the proposed H-1B Visa Cap Registration program, including any anticipated start date and changes to the electronic program from the initial proposed rule (AILA Doc. No. 11030261).[3] AILA renews its concerns contained in the May 2, 2011, comment and would welcome an opportunity to work closely on any new proposed version of the program (AILA Doc. No. 11050267).[4]
Response: On October 20, 2011, Director Mayorkas issued a message stating that USCIS was postponing issuing a final rule. Instead, USCIS continues to assess how the proposed rule's objectives can be achieved within the framework of our ongoing Transformation initiative.

Elimination of Form I-94 and Elimination of Admission Stamps

On August 2012, U.S. Customs and Border Protection confirmed that CBP no longer places admission stamps on Form I-20 and Form DS-2019 (AILA Doc. Nos. 12082242 & 12090543).[5] AILA understands that some staff at certain benefit granting agencies (for example, motor vehicle agencies) look for a stamp on these documents before granting a benefit and the absence of the stamp has created unintended consequences. We anticipate similar problems when CBP implements the elimination of the I-94 entirely.

Question 4a: Can you explain the efforts that USCIS is making to reach out to the other agencies on this issue, and to prepare for the elimination of the I-94? Please identify the agencies USCIS has notified.
Response: CBP's I-94 initiative is to automate, not eliminate, Form I-94. USCIS has held several outreach events to hear agencies' concerns regarding Form I-94 automation. In February 2012, the SAVE program announced I-94 automation and hosted a national stakeholder engagement with CBP on this topic. In addition, USCIS hosted training webinars for SAVE customer agencies, followed by a joint USCIS and CBP conference call with departments of motor vehicles and the American Association of Motor Vehicle Administrators, and dissemination of I-94 frequently asked questions to SAVE customer agencies. To expand on these outreach efforts, in April 2012, the USCIS Public Engagement Division

---

[2] *DHS Releases Guidance on Treatment of Individuals Previously Subject to NSEERS*, AILA Doc No. 12042661, http://www.aila.org/content/default.aspx?docid=39378

[3] 76 FR 11686, 3/3/11, *DHS Proposed H-1B Registration Rule for Cap-Subject Petitions, Request for Comments*, AILA Doc. No. 11030261, http://www.aila.org/content/default.aspx?docid=34726

[4] *AILA Comments on Proposed H-1B Registration System*, AILA Doc. No. 11050267, http://www.aila.org/content/default.aspx?docid=35269

[5] *CBP Issues Memo on Admissions Stamp on Form I-20*, AILA Doc. No. 12082242, http://www.aila.org/content/default.aspx?docid=41005; *CBP Discontinues Stamps on I-20 Form*, AILA Doc. No. 12090543, http://www.aila.org/content/default.aspx?docid=41170, http://www.cbp.gov/xp/cgov/travel/travel_news/cbp_i20_stamp.xml

with CBP discussed I-94 automation at a quarterly intergovernmental affairs teleconference. Also in April, USCIS and CBP had individual conference calls with DMVs in North Carolina and South Carolina, California, New York, Georgia, and Florida as well as the California Department of Health Services, Department of Health and Human Services (Federal), and the Department of Education (Federal). In addition, USCIS and CBP participated in the July 2012 Student Exchange Visitor Program's (SEVP) Local Town Hall Meeting to discuss I-94 automation with local university officials. Most recently, in August 2012, USCIS disseminated an announcement reminding agencies to use the Unexpired Foreign Passport in lieu of the I-94 when appropriate, reminding agencies that I-94 automation by CBP will occur at a future date.

Question 4b: What, if anything, is being done by USCIS to prepare for this process in connection with I-9 verification, and will instructions be revised to take this into account?
Response: USCIS proposed revisions to Form I-9, published on March 27, 2012, and updated on August 22, 2012 (correction published on September 14, 2012). The revisions retain Form I-94 (AILA Doc. No. 12032720).[6] In addition to formatting changes, the proposed revisions to Form I-9 take into account CBP's I-94 automation initiative by adding space in Section 1 for the employee to note his or her foreign passport information. This information can be used to obtain admission information just as in the case of Form I-94. No changes were made to the documents on the List of Acceptable Documents. It was determined that CBP's I-94 automation initiative will not require changes to this list.

Question 4c: AILA is concerned that the implementation of the new I-9 should be accompanied with a lengthy roll-out and transition. Will USCIS consider a 180 day transition to outreach can be conducted to the millions of affected employers?
Response: Currently, USCIS is awaiting OMB approval of the revised form. Once approved, USCIS is planning to conduct vigorous public outreach prior to posting the revised form for use. USCIS will take your suggestion regarding a transition period under advisement.

Inaccurate Processing Times and Processing Delays

During the March 29, 2012, meeting with AILA, USCIS representatives stated that they would do further investigation as to the source of the discrepancy between the processing times listed online and the "actual" processing times that are provided to National Customer Service Center (NCSC) information officers (AILA Doc. No. 12033045).[7]

Question 5a: What did your investigations reveal as the source of the discrepancy?
Response: Investigations revealed that our Texas Service Center had inadvertently been processing cases out of receipt order thereby deviating from our standard first-in / first-out policy. This processing error is believed to be the source of the customer complaint that was raised during the March 29 meeting. The processing time calculation was confirmed to be correct, and it is important to note that the processing times posted on the web are not representative of real-time active case status (i.e., an aging report), but are an approximation of the average time that an office is taking to complete the processing of cases received.

---

[6] 77 FR 18256 (3/27/12) and 77 FR 50710 (8/22/12), *USCIS Comment Request of Form I-9*, AILA Doc. No. 12032720, http://www.aila.org/content/default.aspx?docid=39073

[7] *AILA/USCIS Liaison Meeting Q & As* (03/29/2012), Q 1(c)(iii), posted on AILA InfoNet at AILA Doc No. 12033045, http://www.aila.org/content/default.aspx?docid=39104, http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/March%202012/AILA_Liaison_Committee_agenda_3-29-12_FINAL.pdf

USCIS calculated processing times are simply a reflection of the number of months of application/petition receipts that an office's inventory of pending cases represents. The 4.1 month processing time reported for the TSC indicates that the inventory of pending cases was equivalent to the number of cases that the center had received over the past 4.1 months. We are unable to say, however, that all of the cases reported within the pending inventory were no older than 4.1 months. The fact that the TSC had inadvertently began processing cases out of receipt order provides important information to suggest that the TSC was very likely holding cases that were much older than the 4.1 month processing time displayed on the web page, and the source of the customer dissatisfaction communicated.

USCIS expresses the online processing times based on workload processing goals. If USCIS is processing a particular type of petition in less time than the processing goal, the public sees the processing times expressed in months. However, if the Service Center is taking longer than the processing goal to handle the form type in question, USCIS will post the filing date of the oldest pending case the Service Center has to process as of the date the website chart was last updated.

In calculating the processing times, USCIS only calculates the time a case is considered to be actively pending with USCIS. The processing time is calculated based on the time it takes USCIS to adjudicate the case. It does not take into account the time USCIS is waiting for action by the Petitioner. For example, if a Petitioner has not presented sufficient evidence to establish eligibility for the classification sought in its petition, rather than denying a case, USCIS may issue a Request for Further Evidence (RFE) or a Notice of Intent to Deny (NOID) to allow the petitioner an opportunity to supplement its filing. When USCIS issues an RFE, a petitioner is given 12 weeks (84 days) to respond. Because the response time varies and depends upon each petitioner, USCIS does not factor the time it is waiting for action from the petitioner into its processing times.

Question 5b: The new processing times charts reveal that processing times for cap-subject H-1B petitions is over four months. What steps is USCIS making to processes these cases so that cap-gap beneficiaries can continue to be employed on and after October 1st, and so those beneficiaries with consular notification have sufficient time to be processed for visas and admission by their requested October 1st start dates?
Response: USCIS understands AILA's concerns about the processing times for cap-subject H-1B petitions, including cap gap and consular notification cases. Service Center Operations has made the adjudication of these cases by October 1st a top priority and even authorized overtime to the Service Centers for this purpose. Our Service Centers are doing their best to adjudicate these cases as soon as possible.

Question 5c: On August 17, 2012, USCIS posted the most recent processing time reports; however, the data indicates that the information is current as of June 30, 2012.[8] This means that the data was already 45 days old when published. Are there any efforts underway to gather and report the data in a more timely manner, and if so, when does USCIS expect to be able to publish this more timely data?
Response: As noted in previous communications with AILA, the USCIS Office of Performance and Quality (OPQ) has been working with the Office of Information Technology to develop a new Enterprise Performance Analysis System (ePAS) to replace its legacy reporting system that relies upon the manual collection and self-reporting of monthly performance data. The current performance reporting process is cumbersome and time consuming, and has long impacted USCIS' ability to post processing times earlier than 45 days after the close of the reporting month. The ePAS system continues to offer the greatest

[8] *Processing Time Reports*, www.aila.org/processingtimes, https://egov.uscis.gov/cris/processTimesDisplayInit.do

immediate opportunity for near real time reporting of processing time information. However, the system continues to undergo development and testing, and implementation is now planned for early FY2013. In the meantime, the OPQ has been working to identify options for improving the timeliness of processing time reporting. One such option identified involves using initial performance data received from field components to calculate processing times, rather than waiting until all internal data review and validation efforts are completed. A study of initial and final data over the past several months has identified that very few changes impacting processing time calculations were being made to the initial data following receipt from the field components. Therefore, switching to the use of initial data to calculate processing times is expected to immediately reduce the current 45-day posting delay by 33%, or 15-days. By using initial data USCIS will be able to post processing time information 30 days following the end of the reporting month, thereby providing customers with information that is more current and useful. USCIS will be implementing this process change starting with the posting of August 2012 processing times, which were posted on October 4, 2012. This process change will be instituted and maintained until such time that the ePAS system is implemented and system data is available to further improve the timeliness of posting processing time information to the USCIS website.

Entrepreneurs in Residence (EIR) Program

Question 6a: On May 18, 2012, USCIS released in full certain documents related to USCIS fraud investigations in the H-1B program (AILA Doc. No. 12052252).[9] Many of the criteria that USCIS considers to be indicators of fraud, such as companies in operation for less than ten years, companies with less than 25 employees, and companies with less than $10 Million annual revenue are characteristics commonly shared by small and emerging businesses and entrepreneurial ventures. Given the priority the administration has given to encourage immigrant entrepreneurship, what steps has USCIS taken to ensure that these criteria are not being used to effectively contradict the Administration's policy?
Response: USCIS is reviewing its current guidance on this issue.

Question 6b: How has the Entrepreneurs in Residence program informed USCIS thinking in processing petitions filed by entrepreneurs?
Response: The EIR initiative has provided USCIS with a greater understanding about the startup landscape which should result in more efficient and effective processing of petitions filed by startup and small companies.

Specifically, the EIR team explored additional forms of evidence that the agency has not traditionally asked for, and that entrepreneurs may be able to provide, to help determine eligibility for certain nonimmigrant visa classifications. The EIR team also developed and deployed a training workshop for USCIS employment-based immigration officers at the Vermont and California Service Centers that focused on entrepreneurs and the environment for startup companies and early-stage innovations. A smaller group of officers at both the VSC and CSC, who have been designated to review all startup and entrepreneur petitions, received additional document-specific training and participated in case study workshops with the EIR team.

In addition to internal education, the EIR team is developing a new web portal that aims to close the information gap between USCIS and the entrepreneurial community. This resource aims to provide foreign entrepreneurs with a high level overview of the nonimmigrant visa process, a summary of key

[9] *USCIS Memo in Response to H-1B Benefit Fraud and Compliance Assessment Findings*, AILA Doc. No. 12052252, http://www.aila.org/content/default.aspx?docid=39755

requirements for nonimmigrant visa categories, and filing tips to help them better understand the evidentiary requirements for nonimmigrant visa categories.

Question 6c: AILA remains concerned that the interpretation of the employer-employee relationship advanced by USCIS in the January 8, 2010, memorandum "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements," applied in not only the adjudication of H-1B petitions, but also in I-140 petitions, impedes opportunities for entrepreneurs and small and start-up businesses (AILA Doc. No. 10011363). [10] The requirements to establish the existence of an employer-employee relationship set out in the memo are felt particularly by entrepreneurs seeking to have corporations that they established petition on their behalf. What steps has USCIS taken to ensure that the adjudication of petitions for company owners are in line with the goals of the Entrepreneurs in Residence Program and the historical legal precedent on whether a corporation can petition for a shareholder?
Response: The EIR team evaluated the challenges and limitations faced by entrepreneurs in filing for and obtaining H-1B visas enabling them to work for their own or other startup companies. USCIS continues to review these issues as they relate to current guidance on the employer-employee relationship.

Question 6d: Another area of adjudications that seems to be running contrary to the goals of the Entrepreneur in Residence Program continues to be denial of H-1B petitions for Market Research Analysts. For example, adjudicators often base the decision to deny on the conclusion that a start-up company or a small business does not require an individual in the specialty occupation of a Market Research Analyst when in today's increasingly complex marketplace, it is increasingly likely that an entrepreneurial venture or small company will be using a market Research Analyst to perform sophisticated market analysis. Can USCIS provide some insight into how the lessons of the EIR program might have informed adjudications in this area?
Response: As discussed above, the EIR team developed and deployed an intensive training workshop for USCIS employment-based immigration officers at the Vermont and California Service Centers. The training covers a variety of topics such as the history and anatomy of a startup, business fundamentals, stages of a startup, and funding and sources of capital. Among other things, the training aims to provide officers with a better understanding of the typical roles and responsibilities within the context of early stage startup companies.

Question 6e: Entrepreneurs and other H-1B petitioners continue to see denials of H-1B petitions where the "highly specialized knowledge" required for a specialty occupation may be obtained in a variety of ways and through a variety of formal academic programs or majors, and where a degree in one of several academic fields may provide the appropriate academic background required for entry in the occupation. This issue was raised during the March 29, 2012, meeting between AILA and USCIS HQ, during which AILA provided USCIS with several specific case examples (AILA Doc. No. 12033045).[11] An April 4, 2012 memorandum from AILA further elaborates on concerns regarding

---

[10] *USCIS Memo on Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*, AILA Doc. No. 10011363, http://www.aila.org/content/default.aspx?docid=30950; *Strategic Staffing IT, Inc. v. Mayorkas* (No. 4:11-cv-15709, U.S.D.C, E.D., Mich).

[11] *AILA/USCIS Liaison Meeting Q & As* (03/29/2012), Q 2(b), posted on AILA InfoNet at AILA Doc No. 12033045, http://www.aila.org/content/default.aspx?docid=39104, http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/March%202012/AILA_Liaison_Committee_agenda_3-29-12_FINAL.pdf

USCIS restrictive interpretation of "specialty occupation" and "body of highly specialized knowledge" in H-1B petitions and asks USCIS to take steps to bring adjudications in line with the statute and regulations (AILA Doc. No. 12040451).[12] Unfortunately, there has been little noticeable change in adjudications, and petitioners still receive denials where study in one of several academic fields followed by a degree is held to be evidence that the position is not a "specialty occupation" and that the beneficiary is not qualified. Please update us on steps that USCIS has taken to bring H-1B adjudications in line with respect to the interpretation of the terms "specialty occupation" and "body of highly specialized knowledge."
Response: USCIS is currently reviewing the issues raised in AILA's April 4, 2012 memorandum related to the interpretation of "specialty occupation" and "body of highly specialized knowledge."

Question 6f: Statistics released by USCIS and a recent study by the National Foundation for American Policy have shown that the rates of requests for evidence and denials for petitions in the L-1B classification have increased dramatically and that the standard for what qualifies under the L-1B classification has been severely limited (AILA Doc. Nos. 12082954 & 12020964).[13] This has been a particular burden on new and emerging companies in the U.S. The increase in requests for evidence and denials has happened even as practitioners have been overly cautious in recommending the L-1B classification to their clients. On January 24, 2012, AILA submitted a memorandum to USCIS on the current interpretation of "specialized knowledge" (AILA Doc. No. 12012560).[14] Please update us on USCIS' review of the memorandum and on the long-promised L-1B memorandum. (POLICY)
Response: USCIS continues to review the issues related to the interpretation of "specialized knowledge," and is considering AILA's memorandum of January 24, 2012 as part of this review.

Question 6g: One particularly problematic interpretation for foreign entrepreneurs starting or maintaining a new office in the United States is the bifurcation of the analysis of the definition of "specialized knowledge" into (a) whether the beneficiary has specialized knowledge and (b) whether the position requires specialized knowledge. This interpretation is also illustrated in the attached example. The regulation requires the Petitioner to submit "(ii) Evidence that the alien will be employed in a . . . *specialized knowledge capacity* . . ."[15] INA 214(c)(2)(B) defines "specialized knowledge" as follows: "For the purposes of section 101(a)(15)(L), *an alien is considered to be serving in a capacity involving specialized knowledge* . . . if the alien *has* a special knowledge of the company product and its application in international markets or *has* an advanced level of knowledge of processes and procedures of the company." The use of the term "involving" rather than "requiring" when discussing specialized knowledge capacity also speaks to a unified definition. This interpretation has been followed historically

---

[12] *AILA Memorandum to USCIS Interprets H-1B "Specialty Occupation,"* AILA Doc. No. 12040451, http://www.aila.org/content/default.aspx?docid=39153

[13] *NFAP Report on High Denial Rates of L-1 and H-1B Petitions at USCIS*, National Foundation For American Policy, NFAP Policy Brief, February 2012, AILA Doc. No. 12020964, http://www.nfap.com/pdf/NFAP_Policy_Brief.USCIS_and_Denial_Rates_of_L1_and_H%201B_Petitions.February2012.pdf; USCIS L-1B Performance Data by Approvals and Denials, AILA Doc. No. 12082954, http://www.aila.org/content/default.aspx?docid=41107, http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/i-129-l-1b-performance.pdf

[14] *AILA Memorandum to USCIS Interprets L-1B "Specialized Knowledge,"* AILA Doc. No. 12012560, http://www.aila.org/content/default.aspx?docid=38301

[15] 8 CFR §214.2(l)(3)

as well.[16] Inappropriately bifurcating the analysis particularly works a hardship on new offices of a foreign company. AILA requests that the service centers amend their analysis to comport with the statutory and regulatory definition of "specialized knowledge" in this regard. **(POLICY)**
Response: USCIS appreciates AILA's request and will consider this request within our review of the interpretation of "specialized knowledge."

Adam Walsh Act

Recently, the Board of Immigration Appeals (BIA) has begun remanding denied I-130 petitions based on Adam Walsh Act (AWA) determinations back to the USCIS for clarification on various legal issues. These cases remain pending without resolution. The AWA raises many legal issues which remain unresolved and on which the public needs clarification. Please let us know if USCIS has formulated a response to the following questions posed by the BIA on remand and/or if we can expect further guidance on these issues in the near future.

Question 7a: Whether the government has the burden of proving that the petitioner's conviction is for a "specified offense" against a minor under section 111 of the AWA?

Question 7b: Whether the categorical and modified categorical approach should be used in making the foregoing determination?

Question 7c: If the petitioner is found to have been convicted of a "specified offense" against a minor, is there a rebuttable presumption that the petitioner will post a risk to the beneficiary or a derivative beneficiary? Further, what is the basis for the presumption and does it only apply to visa petitions where the principal beneficiary or a derivative beneficiary is a minor?

Question 7d: If the petitioner is found to have been convicted of a "specified offense" against a minor, whether and under what authority, the government applies a "beyond a reasonable doubt" standard in determining—as a matter of discretion—if petitioner is a risk to the safety or well-being of the principal or a derivative beneficiary.

Question 7e: Whether the Director must explain the rationale for his/her conclusion that the petitioner poses a risk to the principal beneficiary or a derivative beneficiary?

Question 7f: If the Director denies a visa petition under the AWA and the petitioner files an appeal to the BIA, does the BIA have jurisdiction to review the question of whether the Secretary applied the correct standard in determining whether a petitioner has shown he or she is not a risk to the principal beneficiary or any derivative beneficiary?

Question 7g: What is USCIS's position on the nature and scope of the BIA's jurisdiction over other aspects of the appeal?
Response: USCIS has submitted a filing to the Board setting out its current positions on these points. We look forward to the Board's decision in that case, which we anticipate will result in further guidance on these issues.

[16] *Matter of Raulin*, 13 I&N Dec. 618 (Reg. Comm. 1970); *Matter of Vaillancourt*, 13 I&N Dec. 654 (Reg. Comm. 1970); *Matter of LeBlanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Colley*, 18 I&N Dec. 117 (Comm. 1981); and *Matter of Penner*, 18 I&N Dec. 49 (Comm. 1982).

I-140 Ability to Pay Issues

Question 8: AILA has received reports of RFEs for large corporations with regard to the ability to pay where the companies file consolidated returns or consolidated financial statements. Both the Internal Revenue Act and the Securities and Exchange Act permit consolidated filings for a parent company and the wholly-owned subsidiaries. However, USCIS has stated in the RFEs issued to these employers that "the annual report does not prove the ability to pay because the petitioner's parent has no obligation to pay the salary offered to the beneficiary by its subsidiary." It would appear that a consolidated return or audited financial statement that shows the ability of the parent company to pay the salary would meet the burden of proof of the ability to pay by a preponderance of the evidence. Please confirm that consolidated returns and audited financial statements for a parent company and the wholly-owned subsidiaries would meet the burden of proof to show an ability to pay by a preponderance of the evidence.

Response: Each consolidated financial statement is evaluated on a case by case basis under the preponderance of evidence standard to determine whether the petitioner has the ability to pay the proffered wage. To the extent the consolidated statement reports financial information about the petitioner, the adjudicator can use that information to evaluate the petitioner's ability to pay the proffered wage.

Schedule A, Group I EB-2 filings for Physical Therapists

Question 9: Members have raised concerns about Texas Service Center (TSC) and Nebraska Service Center (NSC) denials of Schedule A, Group I EB-2 filings for certain foreign physical therapists. Typically, these filings include evidence that the beneficiary has the equivalent of a master's degree in physical therapy as determined by the Foreign Credentialing Commission on Physical Therapy (FCCPT). FCCPT issues more than one type of evaluation. The evaluations submitted in these cases are issued not for licensure purposes but solely for the purpose of demonstrating equivalency to U.S. educational coursework and analyze only credits earned consistent with national standards.

By way of background, FCCPT is an agency that authenticates, verifies and evaluates educational documents of foreign physical therapists. FCCPT is authorized to issue the visa screen required by the USCIS and it performs a comparison of an educational curriculum to the U.S. educational standard using the standardized Coursework Tool for Foreign Educated Physical Therapists (CWT), developed by the Commission on Accreditation in Physical Therapy Education, (CAPTE); the only agency licensed to accredit Physical Therapy education programs in the U.S. Each version of the CWT reflects the minimum educational requirements for substantial equivalence to a U.S. first professional degree in physical therapy at the time of graduation.

Despite the recognized expertise of FCCPT as well as their application of strict standards for educational evaluations, USCIS has been denying EB-2 petitions even though FCCPT has concluded, after a detailed analysis of all coursework and credits, that the degree is equivalent to a U.S. Master's degree. Please confirm that a determination by the FCCPT and of the various state licensing authorities that the foreign credentials of a first professional degree in physical therapy is the equivalent if an advanced degree from an accredited U.S. university would meet the burden of proof by a preponderance of the evidence that an Immigrant Visa petition for a physical therapist is entitled to EB-2 classification.

Response: USCIS considers FCCPT evaluations. However, these evaluations are not binding on USCIS. USCIS will continue adjudicating these filings on a case by case basis. Whether the physical therapists are indeed eligible for EB-2 classification depends on the individual facts of each case. For EB-2 classification as a member of the professions holding an advanced degree, USCIS determines whether a beneficiary has an advanced degree, as defined in 8 CFR 204.5(k)(2):

- a U.S. academic or professional degree, or a foreign equivalent degree above that of baccalaureate; or
- a U.S. baccalaureate degree, or a foreign equivalent degree, followed by five years of progressive experience in the specialty, which is considered the equivalent of a master's

degree. NOTE: An alien who does not possess at least a U.S. baccalaureate degree or a foreign equivalent degree will be ineligible for this classification.

Issuance of NTAs in Denied Temporary Protected Status (TPS) Cases

Question 10: The BIA has held that an applicant for TPS may obtain *de novo* review of her TPS application before an immigration judge in removal proceedings.[17] More recently, in *Matter of Figeuroa,* the BIA held that the immigration judge may consider any material and relevant evidence in the proceedings regardless of whether it was submitted to USCIS.[18]

In the November 7, 2011, Notice to Appear (NTA) memo, USCIS indicated that NTAs for denied TPS cases will continue to follow the procedures under the September 12, 2003, Yates Memo (AILA Doc. Nos. 11110830 & 03100240).[19] That memo, in turn, discusses issuing NTAs in denied TPS cases where the denial or withdrawal constitutes a ground of deportability or excludability. The 2003 memo indicates that the regulations *require* the issuance of a charging document when the basis for a TPS denial is a ground of deportability or excludability.[20] The November 7, 2011, memo read in conjunction with the September 12, 2003, memo seems to indicate that USCIS will not issue charging documents for denied TPS cases where the denial is not based on a ground of deportability or excludability.

Where an alien denied TPS wishes to have the application reviewed by an immigration judge, and thus, wishes to have an NTA issued and filed with the immigration court, by what process should that be done? Should the request be in writing to the service center, to a field office, or to a district office? Since the denial often results in denied work authorization, how can an applicant in such circumstances ensure that there will not be adverse consequences for purposes of employment and that the NTA will be promptly issued?

Response: Thank you for raising this issue. It is currently under consideration. In general, if an individual is found ineligible for TPS, USCIS will issue a denial notice with appeal rights. However, a charging document (NTA) will be issued if the denial is based on a ground of ineligibility under 8 CFR 244.4 or inadmissibility under 8 CFR 244.3(c). See 8 CFR 244.10(c). This also applies to withdrawals pursuant to 8 CFR 244.14(b)(3). Therefore, USCIS will not issue an NTA if the denial or withdrawal is for a reason other than ineligibility under 8 CFR 244.4 or inadmissibility under 8 CFR 244.3(c).

Questions on the Cases in Removal and Applications for Benefits

AILA appreciates the efforts of DHS to resolve issues in this area, and efforts by USCIS have had an extremely positive effect on AILA members and the lives of their clients. AILA hopes that we can see similar progress in the following areas:

Question 11a: An individual in proceedings (typically an immediate relative) has an I-130 filed on his or her behalf. At the present time, the I-130 is adjudicated by USCIS, but not transferred to the National Visa Center (NVC) for processing until Immigration and Custom Enforcement (ICE) releases the application. For respondents who intend to depart the country voluntarily and pursue consular processing

---

[17] *Matter of Lopez-Aldana*, 25 I&N Dec. 49 (BIA 2009), 8 C.F.R. §§244.17(B) and 1244.18(b).

[18] *Matter of Figeuroa*, 25 I&N Dec. 596 (BIA 2011).

[19] *USCIS Revises Guidance on the Referral of Cases and Issuance of NTAs in Cases Involving Inadmissible and Removable Individuals*, AILA Doc. No. 11110830, www.aila.org/content/default.aspx?docid=37578; USCIS Guidelines for Service Center Issuance of NTAs, AILA Doc. No. 03100240, www.aila.org/content/default.aspx?docid=9447

[20] 8 CFR 244.10(c)(1) and 244.14(b)(3).

on their approved petition, the ICE hold slows down the adjudication process and appears to add little in the way of administrative efficiency or docket control. Would USCIS consider a process whereby such applicants can request a transfer of the approved I-130 to the NVC so that the beneficiary could more effectively coordinate his or her visa process with the removal process?
Response: If a Service Center receives an I-130 spousal petition and the beneficiary is in removal proceedings, the Service Centers relocate the petition to the District Office if INA 204(g) applies. If INA 204(g) does not apply, and the Service Center has no other reason to believe the petition should be adjudicated at a District Office, the Service Center adjudicates the petition and, if approved, sends the petition to the National Visa Center. The Service Centers do not hold on to the petitions until "ICE releases the application."

Question 11b: A beneficiary of an approved I-130 who is in proceedings and who is eligible to adjust status has the option of moving to terminate proceedings to request adjudication of the adjustment application before USCIS. In cases where the I-485 has already been filed with the Immigration Judge, the application must be returned to USCIS. While the process is smooth in some jurisdictions, applicants in other jurisdictions experience lengthy delays before the application can be adjudicated. Would the agency consider directing field offices to adopt uniform procedures to ensure that consideration of these cases is uniformly predictable and efficient? In some cases, the returned application has not been matched with the corresponding A-file at the time the applicant is interviewed by USCIS, which causes a delay in adjudication and requires additional effort at the field office level. Would the agency consider establishing a single nationwide procedure to effect this transfer?
Response: Field Operations is developing standardized procedures related to all court filings. However, it will take several months to finalize and implement these processes, as development involves coordination with other agencies and some internal system modifications.

Question 11c: At the present time, members continue to report difficulties in obtaining employment authorization for individuals who are in administratively closed removal proceedings. What is the current policy with respect to those individuals whose applications for cancellation of removal were filed with the Immigration Judge prior to administrative closure? Is this policy the same for individuals who filed or renewed an application for adjustment of status with the Immigration Judge prior to administrative closure?
Response: An applicant who has filed for Cancellation of Removal may be eligible for employment authorization if USCIS finds that the applicant warrants a favorable exercise of discretion on the application for employment authorization and as long as the application for cancellation of removal remains pending (8 CFR 274a.12(c)(10)).

An applicant for adjustment of status, whether before USCIS or an Immigration Judge, who has filed for adjustment of status and who USCIS determines warrants a favorable exercise of discretion on the application for employment authorization, is eligible for employment authorization as long as the adjustment application remains pending. (See 8 CFR 274a.12(c)(9)). An individual previously denied adjustment by USCIS may renew their application before an Immigration Judge and apply for an ancillary employment authorization while in removal proceedings.

Administrative closure of immigration proceedings does not result in a final order; it is merely a procedural convenience that authorizes the temporary removal of proceedings from the Court's calendar while retaining the proceedings on the Court's docket. Therefore, during a period of administrative closure, the alien is still "in proceedings" and any application for relief not already adjudicated by the Immigration Judge, remains pending. Therefore, for both Cancellation and Adjustment, where the application is pending at the time of administrative closure, the application remains pending during the administrative closure period and the applicant may be eligible for an ancillary EAD.

Question 11d: AILA members also report difficulty where an I-601 is on appeal at the Administrative Appeals Office (AAO) and not in removal. Will the service issue an Employment Authorization Document (EAD) in these circumstances?
Response: A pending Form I-601 does not provide a basis for employment authorization. cf. 8 CFR 274a.12. The concurrently filed Form I-485 may provide a basis for employment authorization only as long as it remains pending. See 8 CFR 274a.12(c)(9)

Matter of Sesay Cases

In *Matter of Sesay*, 25 I&N Dec. 431 (BIA 2011), the Board of Immigration Appeals held that a K-1 fiancé(e) may be granted adjustment of status, even if the marriage to the K-1 petitioner does not exist at the time the adjustment application is adjudicated, if the applicant entered into a bona fide marriage with the K-1 petitioner within 90 days of entering the U.S. on the fiancé(e) visa. In *Matter of Le*, 25 I&N Dec. 541 (BIA 2011), the BIA cited *Sesay* and held that a derivative K-2 child is not ineligible for adjustment of status simply by virtue of having turned 21 after admission to the U.S.

At the AILA/USCIS liaison meetings in October 2011 and March 2012, USCIS indicated that guidance regarding the treatment of cases under *Matter of Sesay* and *Matter of Le* was under internal review.[21] We also discussed several issues relating to cases impacted by Sesay, such as whether an I-864 affidavit of support is required, and whether USCIS would entertain motions to reopen or reconsider for cases erroneously denied either before or after *Sesay* was issued.

Question 12a: Please advise as to the status of the guidance on *Matter of Le* and *Matter of Sesay*.
Response: Guidance addressing the decisions in *Matter of Sesay* and *Matter of Le* is currently under development.

Question 12b: USCIS has taken the position that following *Sesay*, if the alien and the K-1 petitioner are divorced, the alien may adjust if the K-1 petitioner has executed or is willing to execute an I-864 affidavit of support. For the reasons set forth in the attached memorandum, we respectfully ask USCIS to reconsider this position, and deem the I-864 affidavit of support an optional method of overcoming the public charge grounds of inadmissibility.
Response: The accompanying memorandum suggests that, in most cases, the K-1 and K-2 will seek adjustment while the marriage is intact, with the Form I-129F petitioner submitting the Form I-864. In cases in which this happens, the later dissolution of the marriage should not have a great impact. As noted in the final rule, dissolution of the marriage does not, itself, affect the Form I-864, with respect to USCIS or a benefit granting agency. The DHS regulation does permit a sponsor to withdraw a Form I-864. 8 CFR § 213a.2(f). But this regulation should properly be read in light of *Sesay*. Under *Sesay*, eligibility for a visa number, for adjustment purposes, is determined as of the date of the nonimmigrant admission (assuming a timely marriage). Thus, it is reasonable to conclude that a sponsor's ability to withdraw the Form I-864 is governed by 213a.2(f)(1), rather than (f)(2). In other words, USCIS believes that, if the I-129F petitioner has submitted a Form I-864, he or she *cannot* validly withdraw it after the date of the K nonimmigrant admission.

DHS regulations clearly specify that a K nonimmigrant's adjustment application must be supported by a valid Form I-864 from the Form I-129F petitioner. 8 CFR § 213a.2(a)(2)(i)(A) and (b)(1). The Attorney General adopted these regulations after conducting the required notice and comment process. *See* 71 *Fed.*

[21] AILA/USCIS Field Operations Liaison Q&As (3/21/12), *published on* AILA InfoNet at Doc. No. 12050847 (*posted* 5/8/12); USCIS/AILA Meeting Minutes (10/15/11), *published on* AILA InfoNet at Doc. No. 11100570 (*posted* 10/13/11).

Reg. 35,732 (2006) (final rule) and 62 *Fed. Reg.* 54,436 (1997) (interim rule). The clarification that the Form I-864 requirement applies to the K-1 and K-2 when they seek to adjust was made in response to a specific comment on this issue. *See* 71 *Fed. Reg.* at 35,736. As the Board has recognized, administrative agencies do not generally have authority to determine that a regulation is not valid. *Cf. Matter of Hernandez-Puente,* 20 I&N Dec. 335, (BIA 1991).

Provided that the K-1 marries the K-1 petitioner as required, an immigrant visa is available to the K-1 (and K-2) for purposes of adjustment. As the Board stressed, the K-1 and K-2 are treated substantially the same as immediate relatives, if, at the time of admission, they were fully eligible for this classification, except that the marriage of the K-1 and K-2 had not yet taken place.

But since they adjust on the same basis as other immediate relatives, INA § 212(a)(4)(C) expressly says they are inadmissible on public charge grounds unless "the person petitioning for [their] admission" has submitted an affidavit of support under INA 213A. The "person petitioning" is, necessarily, the Form I-129F petitioner. USCIS acknowledges that INA 213A(f), itself, refers to the petitioner "under 204," which the Form I-129F petitioner is not. If only a § 204 petitioner *can* file an I-864, but all immediate relatives (with exceptions not relevant here) need one, then some who are subject to the I-864 requirement will be unable to satisfy it.

Also, treating K-1 and K-2 adjustment applicants as exempt would not be consistent with the main point of *Sesay* – that they should be treated the same as other immediate relatives, regardless of whether the qualifying marriage takes place before, or very soon after, admission.

Question 12c: Will USCIS adopt a policy and implement procedures to permit late motions to reopen/reconsider without a filing fee for cases that were erroneously denied in light of *Sesay*? USCIS adopted a similar procedure for certain individuals impacted by the *Hootkins v. Napolitano*, No. CV-07-5696 (C.D. Cal. filed Aug. 30, 2007) class action, to address I-130s that were erroneously denied on or after August 30, 2001, due to the death of the petitioning spouse.[22] USCIS set up a process whereby parties were permitted to request reopening, without having to pay the motion to reopen filing fee.[23] Such a policy would allow *Sesay* applicants that were wrongfully denied adjustment of status to avoid the undue expense of refiling and would be a simple means of offering an equitable solution to this group of applicants.

Response: Any application or petition that was erroneously denied will be reconsidered upon timely filing with fee of a motion. See 8 CFR §103.5(a). Untimely filed motions alleging service error may be considered for service motion on a case-by-case basis. USCIS is not currently contemplating a blanket procedure to waive the filing requirements of a motion specific to the issues addressed in *Mater of Sesay.*

---

[22] *See* Fact Sheet: USCIS to Process Applications of Widow(er)s of Deceased U.S. Citizens, located at: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a5febebf59d85210VgnVCM100000082ca60aRCRD&vgnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD.

[23] *Id.*