U.S. Citizenship and Immigration Services

Questions and Answers

USCIS American Immigration Lawyers Association (AILA) Meeting
October 5, 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. Preponderance of the Evidence Standard

At our meeting on April 7, 2011, the Training and Career Development Division (TCDD) advised that they were developing additional training on the burdens and the preponderance standard of proof in benefit adjudications (AILA Doc. No. 11040735).[1] Please advise on the status of the new training, when and how it will be implemented, and interim efforts used to ensure that cases are adjudicated under the proper standard of review.

Requests for evidence (RFE) continue to require, and denials continue to be founded upon, documentary demands that, in practical application, set evidentiary thresholds far in excess of that required to prove eligibility for a benefit by the preponderance of the evidence. We have heard the term "trust but verify" used when discussing the evaluation of evidence. We are concerned that, in its use, an element of doubt in the weighing of evidence is introduced that goes beyond the "more likely than not" preponderance of the evidence standard. As noted in the Ombudsman's Report dated June 29, 2011, elevated RFE rates are impeding legitimate business operations (AILA Doc. No. 11062931).[2] We believe there is a direct connection between the

[1] *AILA Liaison/USCIS Meeting Q&As*, AILA Doc. No. 11040735, http://www.aila.org/content/default.aspx?docid=35068, http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/April%202011/AILA%20_040711.pdf

[2] *CIS Ombudsman 2011 Annual Report to Congress*, AILA Doc. No. 11062931, http://www.aila.org/content/default.aspx?bc=6715|16871|36031,

improper application of the preponderance of the evidence standard and the increase and lack of specificity in many RFEs.

RESPONSE: The Training and Career Development Division (TCDD) has developed training materials on burdens and standards of proofs, and these materials are in final stages of review. Once finalized, the material will be provided to our workforce.

2. Prima Facie Determinations of Naturalization Eligibility

In our April 7, 2001, meeting, AILA requested that USCIS institute a process by which a respondent in removal proceedings who claims eligibility for naturalization would be able to obtain a *prima facie* determination of eligibility for naturalization. Please find at **Attachment A** a memorandum and proposal for such a process. We ask USCIS to review the memorandum and proposal, and to consult, as necessary, with ICE and EOIR for the purpose of re-establishing a standard process to permit the rendering of a *prima facie* determination of eligibility for naturalization.

Response: Thank you for your submission. USCIS will provide updates when available.

3. Kazarian Guidance

We appreciate Director Mayorkas' recognition of the deficiencies with the current *Kazarian* guidance, and his thoughtful review of *Buletini v. INS,*[3] noting particularly this passage: "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." Director Mayorkas emphasized both the burden shifting "unless" and the requirement that such reasons be "substantiated."

We reiterate our concerns as outlined in AILA's memorandum submitted to USCIS on May 27, 2011, and attached at **Attachment B** (AILA Doc. No. 11072274).[4]

We also recognize the announcement by the Administrative Appeals Office (AAO) that they have established a process to invite participation of organizations and individuals as *amici curia,* and the selection of a matter involving the conduct of the *Kazarian* "merits analysis" (AILA Doc. No. 11081830).[5]

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http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf

[3] See *Buletini v. INS*, 860 F.Supp. 1222 (E.D. Mich.1994)

[4] See Appendix B, *AILA Comments on USCIS's Policy Memo on Evidentiary Criteria for EB-1 Petitions*, AILA Doc. No. 11072274, http://www.aila.org/content/default.aspx?docid=36307

[5] *AAO Requests Amicus Briefs on the Appeal of a Denied I-140 Based on Kazarian*, AILA Doc. No. 11081830, http://www.aila.org/content/default.aspx?docid=36676

Please advise on efforts beyond steps taken by the AAO to remedy the *Kazarian* guidance and provide further instruction and guidance to USCIS Adjudicators. Have USCIS adjudicators been instructed that if three criteria are met, the petition must be approved, unless the adjudicator can set forth specific and substantiated reasons for finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard?

RESPONSE: USCIS adjudicators continue to follow the guidance from the December 22, 2010 memo titled, Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the *Adjudicator's Field Manual* (*AFM*) Chapter 22.2, *AFM* Update AD11-14. The memo specifically states:

> "Meeting the minimum requirement of providing required initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an alien of extraordinary ability under section 203(b)(1)(A) of the INA.…"

The memo further states:

> "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."

Although the above is specific to the E11 category, this similar language is also used in the E12 and E21 sections of the memo.

4. EB-1 Adjudications

As we discussed during our April 7, 2011, meeting, the Department of State reported significantly lower demand for EB-1 visa numbers. Since that meeting, we have received statistical data from SCOPS, which shows a substantial drop of 20% in EB-1 approvals between FY2010 and FY2011, despite the fact that the number of receipts has been relatively steady and the percentage of cases that received RFEs has actually declined during that same period (AILA Doc. No. 11072860).[6]

In light of the statistics mentioned above and the administration's renewed commitment to entrepreneurial petitioners, will the Service revisit its adjudicatory practices and provide training to adjudicators (AILA Doc. No. 11080238)?[7]

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[6] See Appendix C, *USCIS Releases EB-1 Statistics for FY2010 and FY2011*, AILA InfoNet Doc. No. 11072860., http://www.aila.org/content/default.aspx?docid=36396

[7] *Secretary Napolitano Announces Initiatives to Promote Startup Enterprises and Spur Job Creation*, Aug. 2, 2011, AILA Doc. No. 11080238, http://www.aila.org/content/default.aspx?docid=36464, http://www.dhs.gov/ynews/releases/20110802-napolitano-startup-job-creation-initiatives.shtm

RESPONSE: Decision rates were higher than receipt rates in FY2010 due to the culmination of USCIS' backlog elimination efforts that year. It is important to note that although the actual number of approvals may have decreased since then, the approval percentage has stayed relatively consistent. Unfortunately, the decision rate in FY2011 did not keep pace with receipts, and a small backlog has developed again. USCIS is currently working to bring processing times back within agency goals.

USCIS is dedicated to providing continuous training. In fact, USCIS has already provided refresher training to its officers to meet the Administration's goals for our entrepreneurial petitioners.

5. VIBE

According to the Ombudsman's Report dated June 29, 2011, USCIS is not tracking the issuance of VIBE-related RFEs. What steps are being taken by USCIS to assess VIBE's impact (AILA Doc. No. 11062931)?[8]

RESPONSE: USCIS generally issues RFEs with VIBE-related inquiries with other substantive inquiries. Accordingly, USCIS is unable to track the issuance of VIBE-related RFEs separately. It is important to note that VIBE is a tool to assist adjudicators in assessing and evaluating evidence. It is difficult to distinguish and isolate the impact of VIBE from other important factors such as the quality and type of evidence submitted with each petition. That said, USCIS is currently considering ways to further assess the impact of VIBE in FY2012 and we welcome suggestions in that regard.

In addition, please respond to the following:

a) What efforts are being made by USCIS to ensure that information provided to Dun & Bradstreet (D&B) at USCIS behest is not being made publicly available, released, or sold?

RESPONSE: USCIS does not provide any information about the petitioning organization to Dun & Bradstreet (D&B). USCIS queries the petitioning organization name and address against the D&B database via the VIBE (Validation Instrument for Business Enterprises) System. The VIBE system automatically bounces the petitioner's name and address against D&B data within USCIS firewall to find a matching company or organization.

b) What efforts are being made by USCIS to ensure that petitioners are not charged a fee by D&B to comply with USCIS's requests?

RESPONSE: USCIS continually tries to notify stakeholders that there is no fee for a company or organization to create a record with D&B, view its own D&B report or update its information with D&B.

[8] *CIS Ombudsman 2011 Annual Report to Congress*, AILA Doc. No. 11062931, http://www.aila.org/content/default.aspx?bc=6715|16871|36031, http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf

In an effort to inform the public on VIBE related issues, USCIS provides important information on our website at www.uscis.gov/vibewww.uscis.gov/vibewww.uscis.gov/vibe.

c) Please explain the *DUNSRight* verification system used by D&B to verify information provided by the petitioner to D&B. What is the verification system? How does D&B verify information that may not be publically available?

RESPONSE: The DUNSRight verification system is described by D&B on their website at: http://www.dnb.com/about-dnb/information-quality/14881801-1.html

d) Please advise if USCIS will continue to accept excerpts from Annual Reports to establish ownership for publicly traded companies.

RESPONSE: The petitioner is responsible for submitting sufficient evidence to establish the qualification of filing. USCIS will continue to accept excerpts from Annual Reports to establish ownership for publicly traded companies, as well as any other relevant evidence to establish eligibility of filing.

6. Requirement for amended H-1B based on move to new geographic location?

As summarized in **Attachment C,** there is a history of conflicting and confusing policy guidance regarding when a change in employee work location may require a new H-1B petition that has provided a very uncertain and unstable environment. This has resulted in both confused enforcement by USCIS (including FDNS) and standards that make it almost impossible for petitioners to develop appropriate compliance programs. AILA does not believe that every change in worksite location is a material change, nor does such a change necessarily amount to a change in the terms or conditions of employment. Rather, we submit that the October 23, 2003, Efren Hernandez letter enunciates a more reasoned standard (AILA Doc. No. 03112118):[9]

> (1) an amended Form I-129 is not needed for geographic moves so long as an LCA has been filed and certified for the new location prior to the employee's move to the new location;
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> (2) an LCA notice posting under DOL regulations was completed; and
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> (3) other wage and hour obligations are met.

A policy that requires an amended H-1B for any geographic change would be overly burdensome for employers. For example, how would the employer document a change in worksite within the same Metropolitan Statistical Area (MSA), which does not require a new LCA but does require a reposting of the notice to employees at the new worksite? Would such a rule include changes in worksites that are within the same commuting area, i.e., if the worksite moves a mile away, to a new building next door, to a new suite in the same building, or to a new address on the same

[9] *Amended I-129 Not Required for Move to Location Covered by LCA*, AILA Doc. No. 03112118, http://www.aila.org/content/default.aspx?docid=9661

campus? The October 23, 2003, Hernandez letter is consistent with other situations where such a change does not require notification, e.g. when an L-1 nonimmigrant holding the same position is moved to another worksite location or where a petitioner reorganizes and the H-1B employee becomes an employee of the new entity (and a sworn statement is added to the Public Access file).

We request that USCIS issue clear and unequivocal guidance confirming the provisions in the Hernandez letter so that petitioners and USCIS can follow and rely upon it.

RESPONSE: This issue is currently under examination within the H-1B policy review working group as part of the comprehensive USCIS policy review. We will take AILA's views into consideration when finalizing the policy on what circumstances would require an amended petition to be filed with USCIS.

7. L-1B Adjudications

AILA continues to be concerned about USCIS's L-1B adjudications and the failure to apply current binding USCIS guidance to these adjudications. Instead, adjudicators are relying on pre-IMMACT 90 case law, as well as adjudicatory standards enunciated in a line of non-precedent AAO decisions, including the case known as *GST* (AILA Doc. No. 08081964).[10] Congress expressly broadened the L-1B category in IMMACT 90.[11]

Under INA §214(c)(2)(B), "an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company 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." USCIS issued two guidance memoranda that define the terms "special knowledge" and "advanced level." The memoranda are *Interpretation of Special Knowledge* by James Puleo on March 9, 1994, [12] and *Interpretation of Specialized Knowledge* by Fujie O. Ohata on December 20, 2002 (AILA Doc. Nos. 0105217 and 03020548).[13] The AFM clearly states that "policy guidance is binding on all USCIS employees" and unpublished and non-precedent decisions of the BIA and the AAO are not to be given the same weight as such policy guidance.[14]

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[10] *See* 2008 WL 5063578. *AAO Unpublished Decision on L-1B Specialized Knowledge, Qualifying Relationship, Effect of Agency Memos*, AILA Doc. No. 08081964, http://www.aila.org/content/default.aspx?docid=26252 , http://www.uscis.gov/err/D7%20-%20Intracompany%20Transferees%20%28L-1A%20and%20L-1B%29/Decisions_Issued_in_2008/Jul222008_04D7101.pdf

[11] Immigration Act of 1990, Pub.L.No. 101-649, 104 Stat. 4978 (Nov 29, 1990).

[12] INS Memorandum, James A. Puleo, Act. Exec. Assoc. Comm., "Interpretation of Special Knowledge" CO-214-P (Mar. 9, 1994), *INS Memo on L-1B Specialized Knowledge Multinationals*, AILA Doc. No. 01052171, http://www.aila.org/content/default.aspx?docid=2928

[13] INS Memorandum, Fujie O. Ohata, Assoc. Comm., "Interpretation of Specialized Knowledge" (Dec. 20, 2002), *INS Memo on Standards for Specialized Knowledge*, AILA Doc. No. 03020548, http://www.aila.org/content/default.aspx?docid=8203

[14] USCIS *Adjudicator's Field Manual* (AFM), Chapter 3.4

Current L-1B RFE and denial templates do not give proper or meaningful weight to the Puleo and Ohata guidance, but instead follow the language and reasoning from pre-IMMACT 90 and post-*GST* cases. Moreover, L-1B petitions are denied on grounds that knowledge or skills are not "unique," that the company is too small to require specialized knowledge, and that the position should be more appropriate for an H-1B. These considerations either directly contradict the actual language of the Puleo and Ohata memos or contradict the essence of the Puleo and Ohata guidance. Given that USCIS has repeatedly stated that the standards have not changed, AILA is gravely concerned by adjudicatory practice by the Service Centers that shows the opposite.

This adjudicatory trend – particularly the use of *GST* -- has drawn the attention of the CIS Ombudsman's office, as evident in the *CIS Ombudman's Annual Report 2010* (AILA Doc. No. 10070860).[15] In the *USCIS Response to the Citizenship and Immigration Services Ombudsman's 2010 Annual Report to Congress*, USCIS agreed that the *GST* decision, while not a precedent decision, was being reflected in USCIS adjudications but stated:

> The term 'specialized knowledge' was deliberately left open-ended by Congress to recognize the fact-specific nature of the term. Given the range of possible factual situations that can arise, flexible regulatory standards of appropriate scope are not necessarily easy to devise (AILA Doc. No. 10112460).[16]

USCIS stated further that it was acceptable for adjudicators to follow the non-precedent decisions in adjudicating cases but that USCIS planned to issue precedent decisions and guidance in the form of memoranda specifically on this issue. This intention was reiterated on the May 12, 2012, stakeholders' teleconference. During this call, most callers expressed concern about the Service's failure to apply Puleo and Ohata. Congress intended to broaden the standard in IMMACT 90 and did not change its position when it passed the L-1 Reform Act, which was aimed at curtailing the activities of so called "job shops" and not at changing how "specialized knowledge" is defined.

While AILA agrees that each petition must be decided on its facts, Puleo and Ohata set forth broadly applicable and flexible standards that allow for case-by-case adjudication, yet still provide petitioners with some measure of predictability. Particularly in view of our economy's desperate need for job creation - which the administration acknowledged comes through small and emerging business – as well as the increasing specialization in technical fields, please remind and train adjudicators that the Puleo and Ohata memoranda, and not *GST*, are the standard for adjudication of L-1B cases.

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[15] CIS Ombudsman's Annual Report to Congress, AILA Doc. No. 10070860, http://www.aila.org/content/default.aspx?docid=32561, http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf

[16] *USCIS Response to the CIS Ombudsman's 2010 Annual Report to Congress*, AILA Doc. No. 10112460, http://www.aila.org/content/default.aspx?docid=33711, http://www.uscis.gov/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Annual%20Reports/cisomb-2010-annual-report-response.pdf

Response: SCOPS, in collaboration with OP&S and OCC, will soon be conducting training on the adjudications standards for officers who adjudicate L-1B nonimmigrant petitions. This training will address AILA and stakeholder concerns mentioned above and during the May 12, 2011 teleconference. In addition, the RFE templates for the L nonimmigrant classification are currently under review as part of the RFE Project. The templates are being reviewed to not only ensure that they are adaptable to the facts and needs of individual L petitions, consistent, clear and concise, but also that they identify any gaps in policy guidance relating to the adjudication of L nonimmigrant petitions. Once the draft L RFE templates are complete, AILA and other stakeholders will be provided the opportunity to review and provide comments.

8. K Visa Issues in USCIS Adjudications

a) *Matter of Le*, 25 I&N Dec. 541 (BIA 2011)

In this precedent decision, the BIA held that a derivative child of a nonimmigrant fiancé(e) visa holder under INA Section 101(a)(15)(K)(iii), is not ineligible for adjustment of status simply by virtue of having turned 21 after admission to the United States on a K-2 nonimmigrant visa.

i. Please confirm that the USCIS will adopt the position of the BIA in the *Le* case.

RESPONSE: Yes, USCIS will follow the BIA's decision in *Matter of Le.*

ii. Will USCIS be issuing guidance to the field on adjudicating cases covered by *Le*?

RESPONSE: Yes, guidance is being developed to address *Le.*

iii. Will USCIS consider Motions to Reopen for Adjustments denied under USCIS' previous interpretation of the age-out provisions of 101(a)(15)(K)(iii)?

RESPONSE: Motions to reopen and reconsider are subject to the time deadlines specified in 8 CFR 103.5. In a case affected by *Le*, it would really be a motion to *reconsider* that would be the proper vehicle, since the motion would be based more on a new legal argument than on new facts.

For cases in which USCIS still has jurisdiction (that is, aliens who are not in removal proceedings or who are in proceedings but who are "arriving aliens") USCIS will consider Motions to Reopen or Reconsider for cases that were denied in the 30 days preceding the *Le* decision and for any cases denied in error following the *Le* decision. USCIS will not, however, grant untimely Motions on cases decided correctly based on the current policy at the time of adjudication. Nor may USCIS grant reopening or reconsideration if EOIR now has jurisdiction over the adjustment claim.

The expiration of the period for filing a motion to reopen or reconsider does not preclude an alien from filing a new Form I-485 in light of *Le*. Nor would it prevent the alien from seeking adjustment before EOIR, if the immigration judge has jurisdiction under 8 CFR 1245.2(a)(1).

iv. With regards to cases in proceedings, will USCIS take jurisdiction so proceedings can be terminated for adjustment before USCIS?

RESPONSE: Cases in proceedings are subject to the jurisdiction of EOIR (with the exception of arriving aliens) and USCIS does not have the authority to "take jurisdiction." It is, of course, within the IJ's jurisdiction to grant adjustment to the K-2 in proceedings or to terminate the proceedings without adjudicating the adjustment, in which case USCIS would regain jurisdiction and adjudicate the application in accordance with *Le*.

v. For cases in the pipeline, how should we alert USCIS to potential age-out issues and to avoid denials and NTAs?

RESPONSE: You may contact the office having jurisdiction over a pending case through normal methods (e.g. mail, InfoPass appointment, etc.).

vi. For cases at the Circuit Court level, will USCIS agree to accept cases on remand for adjudication under the *Le* decision?

RESPONSE: The policy for remand in this instance would fall within ICE's area of responsibility. ICE would have to work with OIL appellate to get cases remanded to EOIR. If after remand, proceedings are terminated, USCIS would adjudicate the I-485 in accordance with *Le.*

b) *Matter of Sesay*, 25 I&N Dec. 431 (BIA 2011)

In this precedent decision, the BIA held that a fiancé(e) visa holder satisfies the visa eligibility and visa availability requirements of section 245(a) of the Act on the date he or she is admitted to the United States as a K-1 nonimmigrant, provided that the fiancé(e) enters into a bona fide marriage with the fiancé(e) petitioner within 90 days. The BIA also held that a fiancé(e) visa holder may be granted adjustment of status under sections 245(a) and (d) of the Act, even if the marriage to the fiancé(e) visa petitioner does not exist at the time that the adjustment application is adjudicated, if the applicant can demonstrate that he or she entered into a bona fide marriage within the 90-day period to the fiancé(e) visa petitioner.

i. Please confirm that the USCIS will adopt the decision of the BIA in the *Sesay* case.

RESPONSE: Yes, USCIS will follow the BIA's decision in *Matter of Sesay.*

ii. Will USCIS be issuing guidance to the field on adjudicating cases covered by *Sesay*?

RESPONSE: Yes, guidance is being developed to address *Sesay.*

iii. Please confirm that an individual can still adjust based on the previous marriage, as long as the applicant can prove that the marriage was bona fide.

RESPONSE: Yes, individuals may still be able to adjust based on a bona fide marriage that was terminated, assuming all other eligibility requirements are met.

iv. Please confirm that an individual can still adjust even if that individual has subsequently remarried. Since the requirements of 245(a) and (d) have been fulfilled once the marriage is entered into within 90 days of entry, it does not matter whether the person remarries, since he or she is seeking adjustment based on the marriage that formed the basis for the K-1.

RESPONSE: Yes, individuals may still be able to adjust based on a bona fide marriage that was terminated, following remarriage, assuming all other eligibility requirements are met.

v. A K-1 enters, marries, and files for adjustment. Before the adjustment is adjudicated, the couple divorces. What happens to the affidavit of support requirement/obligation? Since the requirements of 245(a) and (d) are met at the time of entry on the K-1 have the affidavit of support requirements already attached? Is the U.S. citizen spouse already obligated? If not, is there a procedure for a substitute sponsor?

RESPONSE: Since K-1 and K-2s adjust as the functional equivalents of immediate relatives, there must be a Form I-864 from the K-1 petitioner. If the former spouse has filed, or is willing to file, a Form I-864, the divorce does not terminate the effect of the Form I-864. USCIS is considering how to give effect to the *Sesay* decision while continuing to adhere to statutory and regulatory requirements relating to public charge inadmissibility and affidavit of support requirements. Guidance will be forthcoming.

vi. *Matter of Sesay* states that K-1/K-2 entrants are the "functional equivalents" of immediate relatives, and their eligibility for 245(a) adjustment is determined as of the date of the entry. As the "functional equivalent" of immediate relatives, the bars to adjustment at 245(c) should not apply. *Matter of Le* holds that applicants who enter before the age of 21 but then turn 21 before adjustment can still adjust. If a K-2 applicant has stayed beyond the original K-2 admission and has worked without authorization, please confirm that the K-2 applicant can still adjust since he or she is treated as an immediate relative for adjustment purposes?

RESPONSE: A K-2 who was admitted as the derivative of a K-1 who is found eligible to adjust in light of *Sesay* will also be eligible to adjust, assuming all other eligibility requirements are met. For purpose of 245(c), K-2s are treated as the functional equivalents of immediate relatives.

vii. With regards to cases in proceedings, will USCIS work with ICE to come up with a policy for termination of proceedings so that USCIS can assume jurisdiction over the cases so that proceedings can be terminated for adjustment before USCIS? How can AILA be of assistance in drafting such procedures?

RESPONSE: Termination of proceedings is solely within ICE's purview, but if/when they are terminated, USCIS will exercise its jurisdiction. USCIS and ICE are working

collaboratively to ensure that files in ICE's possession with pending applications where USCIS has jurisdiction are identified and files are transferred to USCIS for adjudication.

viii. There are numerous cases at the Circuit Court level that deal with this issue. Will USCIS work with the Office of Immigration Litigation to come up with a policy for remand of such cases for adjudication under the *Sesay* decision? How can AILA be of assistance in drafting such procedures?

RESPONSE: The policy for remand in this instance would fall within ICE's area of responsibility. ICE would have to work with OIL appellate to get cases remanded to EOIR. If after remand, proceedings are terminated, USCIS would adjudicate the I-485 in accordance with *Sesay*.

c) K-1 ability to work incident to status

The regulation provides that K-1 entrants are work authorized pursuant to status. 8 C.F.R. 274a.12(a)(6). However, the regulations also indicate that the individual must apply for an Employment Authorization Document (EAD) evidencing such status. Since the K-1 status is only valid for 90 days and employment authorization is usually not processed in that time frame it is a waste of resources for both the applicant and the agency to require K-1 holders to file for work authorization in such circumstances. Would USCIS consider as a valid EAD for Form I-9 purposes a Form I-94 that was annotated "Employment Authorized?" Or, would USCIS consult with the State Department and recommend an annotation on the K-1 visa to indicate that employment is authorized for 90 days from date of admission in K-1 status?

RESPONSE: A Form I-94 indicating the individual's K-1 employment authorized status is an acceptable document under List C of Form I-9 for the duration of the individual's K-1 status (90 days). In order to obtain employment, the K-1 would also need a List B document. If the K-1 nonimmigrant wishes to obtain Form I-766, Employment Authorization Document, as evidence of his or her employment authorization and satisfaction of List A of I-9, then he or she must file an Application for Employment Authorization with the required fee.

It is also important to note that the "incident to status" employment authorization for a K-1 or K-2 is valid only "for the period of admission" in K-1 or K-2 status. 8 CFR 274a.12(a)(6). Beginning on the 91st day after admission, employment would no longer be authorized unless the K-1 or K2 has obtained authorization on a different basis, such as the pendency of an adjustment application. Since K-1s and K-2s are the functional equivalent of immediate relatives, section 245(c)(2) would preserve adjustment eligibility despite the unauthorized employment. But an employer must not knowingly continue to employ the individual, once the employment authorization expires.

9. Entrepreneurs and Small Business

a) Working Owners and the Employer-Employee Relationship

USCIS's current guidance on those who qualify as employees for purposes of nonimmigrant and immigrant visa petitions appears to establish an arbitrary roadblock to entrepreneurs, particularly in "new office" L-1 petitions or small office H-1B petitions. An entrepreneur is the boss. According to the Merriam-Webster definition, an entrepreneur is one who organizes, manages, and assumes the risk of a business or enterprise.[17] Therefore, entrepreneurs who do not have the right to control their entity in the U.S. may not want to be entrepreneurs in the U.S.

In January 2010, AILA provided USCIS with a detailed memo regarding the misapplication of *Darden* and *Clackamas* to USCIS's current definition of the employer-employee relationship (AILA Doc. No. 10012760).[18] As explained in that memo, AILA believes that USCIS failed to address all relevant Supreme Court precedent in its analysis, including the more recent and more relevant *Raymond D. Yates M.D., P.C., Profit Sharing Plan v. Hendon*.[19] In addition, a number of administrative precedent decisions acknowledge that a corporation is a separate entity from its stockholders;[20] the sole stockholder may be the beneficiary of a petition filed by the corporation;[21] and an alien who is the sole owner of a bona fide corporation may qualify as an intracompany transferee.[22] As noted above, we believe that USCIS's requirement of "control" is contrary to the very nature of entrepreneurship.

Given the important and well-publicized initiative to encourage entrepreneurs to establish businesses in the U.S., is USCIS considering re-issuing guidance relying on precedent decisions to facilitate the ability of owner-employees to qualify for visas?

RESPONSE: In drafting the January 8, 2010 memorandum on determining employer-employee relationships in H-1B petitions, USCIS reviewed all relevant precedent decisions. At this time, USCIS is not considering issuing additional guidance on this issue.

b) Adjudication of New Office L-1 Visa Petitions

i. Sufficient Staff

By its nature, a new office is in an initial stage of development, often requiring management to wear many hats while developing the business, as well as hiring and

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[17] http://www.merriam-webster.com/dictionary/entrepreneurs

[18] AILA Liaison Memo Re NIV Owners/Beneficiaries, AILA Doc. No. 10012760, http://www.aila.org/content/default.aspx?docid=31108

[19] *Raymond D. Yates M.D., P.C., Profit Sharing Plan v. Hendon*, 541 U.S. 1, 124 S. Ct. 1330 (2004).

[20] *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm.1980); Interim Decision #2826

[21] *Matter of Allan Gee, Inc*., 17 I&N Dec. 296 (Acting Reg. Comm. 1979) Interim Decision #2772

[22] *Matter of M*--, 8 I & N Dec. 24 (BIA 1958, AG 1958) Interim Decision #952

training staff. We have seen RFEs and denials of L-1A "new office" petitions stating that there is not a sufficient level of staff performing the non-managerial or non-executive duties of the position. Requiring there to be subordinate employees performing the non-managerial functions of the position is contrary to the regulatory definition of managerial capacity (8 CFR 214.2(l)(1)(ii)(B)).

AILA encourages USCIS to adopt the January 19, 2011, AAO decision (File: WAC 10 081 50986), in which the AAO held, "The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties?" (AILA Doc. No. 11012430).[23] This would be consistent with the regulations at 8 C.F.R. §214.2(l)(1)(ii)(B) and (C), which provide that the L-1A manager or executive must "primarily" engage in managerial or executive functions.

RESPONSE: Thank you for bringing this issue to our attention. As previously stated in response to question #7, the L RFE templates are currently under review as part of the RFE Project. This review will help to identify issues relating to the L nonimmigrant classification that may require policy guidance to include this particular topic. Further, as noted above, USCIS will be conducting training on L-1 issues in the very near future. Included in this training will be a review of the applicable standards for adjudicating L-1 new office petitions.

ii. Office Space

The L-1 "new office" regulations (8 C.F.R. §214.2(l)(3)(v)(A)) require that sufficient space is secured to house the business operations. However, modern business has changed. With virtual offices and the ability to telecommute, there is no longer a need for "bricks and mortar" office space.

Will USCIS issue guidance confirming that "sufficient space" may be virtual-office space and may include non-traditional lease agreements in light of modern business practices?

RESPONSE: Officers consider the type of business being conducted and the totality of the record when determining if sufficient space is secured to house business operations. Depending on the specific facts presented, virtual office and telecommuting arrangements may, under certain circumstances, be indicative of the establishment of a new office for L-1 purposes.

USCIS will continue to monitor these types of cases, and if needed, will issue guidance in the future.

iii. New Office Extensions

[23] *AAO Approves L-1A Petition on Certification from CSC*, AILA Doc. No. 11012430, http://www.aila.org/content/default.aspx?docid=34245

A new office L is approved for one year, within which time the beneficiary may need to secure a visa and physically move to the U.S. During this year, the beneficiary must "sufficiently establish" the business enterprise. What constitutes a "sufficiently-established" business is not clear and is subject to inconsistent adjudication. Moreover, the consequences of a denial are particularly severe as the business owner(s) have often made substantial investment, only to have the rug pulled out from under them. As a result, promising business enterprises are not allowed to grow and flourish for having failed to meet arbitrary "milestones" often found in denial decisions which are unrelated to any real-world market conditions or business expectations.

Previously, USCIS routinely approved one-year extensions of new office L-1 nonimmigrants in cases where the evidence is clear that there is a *bona fide* business enterprise being developed, but which has not achieved the level of personnel and revenue typically required for a two-year extension. Would USCIS consider reaffirming a prior practice that would automatically, i.e. without a request or a new filing by the petitioner, grant a new office L-1 one-year extension to any new office L-1 extension petition that is deemed insufficient for the standard two-year extension, assuming the company satisfies the standards set forth in 8 CFR 214.2 (l)(14)(ii)?

RESPONSE: As facts vary from case to case and each business develops at a different rate, an automatic one-year extension for a new office may not be justified even if it appears that the business is still in the state of initial, or mid-term, development. As in the case of other new office extension requests (two-year extensions), petitioners seeking a one-year extension should present sufficient evidence to meet their burden of establishing eligibility for a one-year extension.

c) "Specialty Occupations" in the Context of Start-Up Businesses and Small Businesses

One example of a specialty occupation with which USCIS appears to struggle is Marketing Managers and Market Research Analysts. Effective marketing and market development is critical to the growth and success of small businesses, yet in its adjudications, USCIS takes the position that a small business should not need such expertise. Marketing, including digital marketing, has become a core, not ancillary, function of business operations. Where businesses in the past may have focused on developing a sales department (and sales representatives), current technology has often reduced this function in many business sectors to a simple online transaction. USCIS's grounds for denial of these petitions often include (1) the small size of an employer (e.g., "petitioner lacks organizational complexity to credibly offer a position for a marketing analyst") and (2) inquiry into whether the employer has sufficient specialty occupation work for the beneficiary (e.g., "petitioner does not engage in the type of business for which a marketing analyst would be required on a regular basis for any significant length of time."). In *Young China Daily v. Chappell*, a case decided under the old H-1 "distinguished merit and ability standard," though with a still-applicable rationale, the U.S. District Court for the Northern District of California held that USCIS's reliance on similar "factors" was improper and reversed the denial.[24]

[24] *Young China Daily v. Chappell*, 742 F.Supp. 552, 554 (N.D.Cal. 1989).

Please advise on the regulatory basis or policy that indicates the types of specialty occupations appropriate for small businesses.

RESPONSE: The types of specialty occupations that may be appropriate for a small business will depend on the facts and circumstances of each case and the applicable statutory and regulatory requirements for H-1B petition approval. The statute and regulations require that the beneficiary will be coming to the United States to perform services in a specialty occupation. In determining whether or not the beneficiary's intended employment will be in a specialty occupation, as required for eligibility and petition approval, USCIS reviews the terms and conditions of the intended employment as stated on the petition and in the supporting evidence, including the job duties for the role. Job titles are not controlling in making this determination. The evidence in the record for each case is reviewed in its entirety to determine if the beneficiary will be employed in a specialty occupation.

d) H-1Bs for Solo Practitioners and/or Small Physician Practices

Many states prohibit what is generally referred to as the "corporate practice of medicine" (CPOM). In general, CPOM laws prevent a business corporation from practicing medicine or from employing a physician to practice medicine, although most states allow physicians to provide medical services through a professional corporation, provided that each shareholder is a physician. There is also a federal statute, commonly referred to as "the Stark Law," that prohibits a physician who has a financial relationship with an entity from referring patients to that entity for a range of health services covered by the Medicare program. In addition to these concerns with state and federal law, there are a host of medical malpractice and negligence liability-related reasons why hospitals are often unwilling and unable to employ physicians directly. The result is that physicians are typically employed as independent contractors (with the individual physicians having established their own solo practitioner legal entities) or through independent medical groups.

For many years, legacy INS and USCIS adjudicated H-1B petitions so as to permit nonimmigrant visa holder physician-entrepreneurs to establish small or solo practices in which they hold an ownership stake, which comported more closely with the legal and practical realities in which most medical practices are structured. Further, approving such H-1B petitions will permit IMGs to play a larger role in mitigating the increasing physician shortages in remote rural and poor urban areas, as well as generating medical practice employment opportunities for these communities.

AILA encourages USCIS to return to prior H-1B precedents and policy and consider how USCIS's new entrepreneur initiative may benefit International Medical Graduates (IMGs) who, often out of legal necessity, are full or partial owners of their own practices.

RESPONSE: Thank you for your comments and suggestions. USCIS will take this into consideration.

e) NIWs for Entrepreneurs

The National Interest Waiver (NIW) may be a great tool to encourage entrepreneurs to establish and build their businesses in the United States. However, USCIS's August 2, 2011,

"Frequently Asked Questions Regarding Entrepreneurs and the Employment-Based Second Preference Immigrant Visa Category"[25] misstates the legal standard for NIWs, as established in the precedent decision, *NYSDOT* (AILA Doc. Nos. 11080267 and 98082040*)*.[26] Specifically, the FAQ states that in order to qualify under the third prong of the *NYSDOT* test, the entrepreneur must "present a significant benefit to the field of endeavor." This is not correct. The third prong of the NIW standard requires a showing that the national interest would be adversely affected if a labor certification were required. This is quite a different standard than "potential benefit to the field of endeavor," which is more akin to the E-1-1 standard.

AILA requests issuance of a revised FAQ.

RESPONSE: Our response to Question #18 of the FAQs is correct. The requirement that "[t]he alien must clearly present a significant benefit to the field of endeavor" is taken verbatim from the discussion of the third prong in the NYSDOT decision. See Matter of New York State Dept. of Transportation, 22 I&N Dec. 215, 218 (Comm. 1998).

Accordingly, USCIS will not revise Question #18 of the FAQs.

10. Family Unity

In order to be eligible for benefits under the Family Unity Program (FUP), the beneficiary must have entered the U.S. before May 5, 1988 (or in certain cases, as of December 1, 1988), and have "continuously resid[ed] in the United States since that date." 8 CFR §236.12(a)(1). However, according to the USCIS *Adjudicator's Field Manual* (AFM), "If the applicant leaves the United States without advance parole after May 5, 1988 ... the I-817 (Application for Family Unity Benefits) must be denied." AFM Ch. 24.4(d)(2).

As background, INS initially denied FUP benefits to applicants who had any absences from the U.S. after May 5, 1988. However, as a result of a class action settlement, INS agreed to not interpret "continuous residence" as "continuous physical presence" and to instead consider a host of factors (such as length of time outside the U.S., location of family ties, property, job, etc.) in determining whether continuous residence was broken.[27] There is no mention of advance parole as a pre-requisite to departure in the settlement agreement, in the regulations, or the form instructions for applicants for initial FUP benefits. In fact, it is hard to imagine a scenario where DHS would grant advance parole to an individual in the United States without lawful status and without any basis for returning.

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[25] *USCIS Q&As on Entrepreneurs and the EB-2 Immigrant Visa Category*, AILA Doc. No. 11080267, http://www.aila.org/content/default.aspx?docid=36456, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=93da6b814ba81310VgnVCM100000082ca60aRCRD&vgnextchannel=44eec665e1681310VgnVCM100000082ca60aRCRD

[26] *N.Y.S. Dept of Transportation*, 22 I&N Dec 215 (Assoc.Comm. 1998), I.D. #3363, AILA Doc. No. 98082040, http://www.aila.org/content/default.aspx?docid=1885

[27] *Maca-Alvarez v. INS*, No. CIV-S-93-1824 EJG/PAN (E.D. Cal. 1995)

Therefore, it appears that the language in the AFM requiring advance parole as a prerequisite to any departure after May 5, 1988, is contrary to the regulations and the *Maca-Alvarez* settlement agreement. We ask that USCIS amend the AFM to eliminate the advance parole requirement and provide for an analysis of continuous residence that properly reflects the terms of *Maca-Alvarez.*

It is noted, however, that 8 CFR §236.16 requires advance parole after the beneficiary has been granted initial FUP benefits. This requirement is reiterated on the instructions to Form I-817, Application for Family Unity Benefits (page 1, "When Should I Use Form I-817?"). If the AFM provision requiring advance parole after May 5, 1988, was intended to apply only to those who have been granted initial FUP benefits, we ask that the AFM be amended to reflect this intention.

RESPONSE: USCIS has reviewed the advance parole requirements for I-817 applicants in AFM 24.4(d)(2) and agrees that until an individual is initially granted family unity benefits, he or she generally would not have a basis for the grant of advance parole. Therefore, an I-817 should not be denied for initial applicants due to departures from the U.S. without advance parole.

Temporary absences from the U.S. are reviewed according to the considerations reiterated in the *Applicant Processing for Family Unity Benefits* final rule, issued after the Maca-Alvarez settlement on December 21, 1995. USCIS will continue to review temporary absences from the U.S. according to the factors set forth in *Matter of Huang*, 19 I&N 749, 753 (BIA 1988), as specified in the Final Rule. See 60 FR 66062-02. These factors include the duration of the alien's absence from the United States, the location of the alien's family ties, the alien's property holdings and job, and the intention of the alien with respect to both the location of his actual home and the anticipated length of his excursion.

An alien granted family unity benefits who intends to travel outside the United States should apply for advance parole by filing a Form I-131. If the individual does not obtain advance parole, he or she may not be able to return through a port-of-entry. An applicant making an initial application for family unity benefits or applying to renew family unity has the burden to establish his continuous residence in the United States since May 5, 1988 or December 1, 1988, as applicable. The *Maca-Alvarez* settlement does not directly address the effect of travelling without advance parole and returning unlawfully on "continuous residence." This issue will be referred to the Office of Policy and Strategy for review.

11. AAO Issues

a) Amicus Curiae

AILA has urged on several occasions that the AAO adopt a process for the participation of amici curiae prior to the designation of a decision as "adopted" or precedent. We were pleased that the AAO requested amicus curiae on the nature of the "final merits determination" and its application to extraordinary ability visa petitions filed pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A). In order to ensure that such amicus curiae address the substantive issues, we recommend that the process of providing amicus curiae involve access to the facts of the specific case. While we understand that there may be privacy concerns, we would recommend either that the AAO provide redacted copies of the decision at the AAO for review for which *amicus*

participation has been invited, or institute a process in which the attorney of record can provide such documents.

RESPONSE: We will work with the appellants and the FOIA office to post a redacted version of the underlying decision when we request amicus participation.

b) AAO Proposed Regulations

Please advise when USCIS anticipates the proposed AAO regulation to be published for public comment (the regulation is anticipated to address the AAO's jurisdiction, a formal process for submitting amicus briefs, streamlining of the appeals process, and accrual of unlawful presence while a case is pending before the AAO).

RESPONSE: The proposed regulation remains under internal review and will be published for public response at the close of the review process.

c) AAO Adjudication Statistics

On July 18, 2011 the USCIS Office of Performance and Quality (OPQ) released data reports on agency performance for a number of petition types. At the April 7, 2011 AILA USCIS HQ meeting, the AAO acknowledged that OPQ would *not* be collecting adjudication statistics from the AAO, but that the AAO would begin to report to a new system referred to as the Enterprise Performance Analysis System (ePAS), set to deploy in the near future. Would you please confirm whether ePAS has been deployed and, if so, when ePAS is expected to release AAO adjudication data reports?

RESPONSE: On May 1, 2011 the Enterprise Performance Analysis System (ePAS) was deployed and made available to the AAO and other operational components under a Testing and Evaluation (T&E) mode to allow USCIS to assess the operational effectiveness of the new system and ensure the integrity of the performance data reported. The T&E period uncovered a number of technical problems that were impacting the accuracy and integrity of the performance data reported. As a result, USCIS is extending the T&E period through the end of the first quarter of FY2012 in order to introduce the needed system corrections and provide the OPQ with time to continue validating the functionality, business requirements, and reporting capabilities of the ePAS system and the Standard Management Analysis and Reporting Tool (SMART) package.

Until the ePAS system is formally introduced as the official system of record for performance reporting, AAO data will not be available. Barring any unexpected setbacks with the planned system updates, it is expected that AAO performance reporting will become available starting April 2012. Additionally, it is important to note that ePAS will only capture AAO adjudication activity at the aggregated form level and will not provide case specific performance data typically found in a case management system. ePAS will only provide aggregated form level data for certain key performance metrics such as: monthly begin case pending levels; new cases received in the month; case completed in the month; and cases pending at the end of month. This data is needed to provide management level performance reporting as well as to facilitate the development of future staffing models.

d) Staffing Updates/AAO Processing Times

Please provide an update on AAO staffing and whether the AAO still expects its new officers to be fully trained and working on decisions before the end of the 2011 fiscal year. The AAO has contained processing times for many case types (within 6 months – often just 2 months – for 31 case types), but there has been some slippage in the lengthy processing times for I-129s (H-1Bs and Ls) and I-140s in particular. Does the AAO expect the new officers, once trained, to facilitate processing times such that all 41 case types will be brought within the USCIS processing time goal of six months or less?

RESPONSE: In October, 2010 we announced that we would be hiring additional adjudicators. The hiring process took longer than we anticipated. As a result the first adjudicators hired reported for duty in July, 2011. The new adjudicators are being assigned to the AAO Branches with the longest case processing times, i.e. I-129s, I-140s, and I-601s. We hope to make significant progress in the coming months with bringing down the processing times related to those cases.

e) AAO Receipts

To facilitate processing time tracking and possibly minimize status inquires to the AAO by attorneys, we recommend and request that the AAO issue receipt notices for cases that it has received. As background, most often once the appeal (Forms I-290B) is submitted to USCIS, we have no idea whether USCIS is still reconsidering the case or when or if and when the case has been forwarded on to AAO as an appeal. Transparency regarding where the case is and when it has been received at the AAO would be extremely helpful.

RESPONSE: Presently, the appellant can go online to check to see the status of their individual case, and can thereby know if it is pending before the AAO or still with another office.

f) Copy of Record

Previously, the AAO indicated it would consult with USCIS leadership in considering AILA's request that the AAO expand 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, and needs a copy of the appeal). Please provide an update on whether the AAO would entertain an attorney's request for a copy of an appeal under these circumstances, and if so, how the request can best be made.

RESPONSE: USCIS is not currently able to honor such requests. However, we will continue to assess the possibility of allowing access to AAO files as we move into a transformed environment.

12. I-131 Biometrics

a) On several occasions at both the Service Center and SCOPS level, AILA has requested that USCIS address the problem faced by Lawful Permanent Residents (LPRs) who apply for a Re-Entry Permit and need to wait in the United States for extended periods of time to

provide biometrics (AILA Doc. Nos 11030726, 09061771, and 09120163). [28] AILA members regularly represent LPRs who are assigned by employers to temporary positions abroad or who need to return to their country of origin for extended periods to care for family members. There are many variations of this problem, but the individuals involved all have a compelling and usually immediate need to be abroad for extended periods. Trips back to the United States for biometrics appointments are often expensive, inconvenient, and disruptive.

This problem does not impact a lot of individuals, but for those individuals who are affected, the disruption and cost is extensive.

RESPONSE: If the applicant needs expedited processing, the Form I-131 instructions provide specific information for submitting pre-paid express mailers with your Form I-131 for USCIS to send your receipt and ASC appointment notice, as well as the completed re-entry permit or refugee travel document, if approved. A request for expedited processing should contain the applicant's reasons for such processing so that USCIS may determine whether he or she qualifies for expedited processing.

In addition, if the applicant must attend an ASC appointment in 14 days or less, the applicant may provide an email address or fax number, then the Nebraska Service Center will be able to fax the ASC appointment to the applicant. The ASC will accept a duplicate copy of the appointment notice.

If the applicant needs to expedite the I-131 after filing, then the applicant should contact the customer service phone number or make an INFOPASS appointment at their local office.

b) AILA has proposed several different possible solutions. We reiterate those proposals again for further consideration.

i. Biometric appointments could be issued with the receipt and, therefore, could be taken within 4-10 days of filing the application for a re-entry permit.

ii. Application Support Centers (ASCs) can be instructed to capture the biometrics for I-131 applications based solely upon the receipt and with proof that the applicant needs to travel imminently and cannot wait for the biometric notice to be issued and scheduled. Indeed, many, but not all, ASCs follow this

[28] *AILA Liaison/SCOPS Q&As (1/19/11)*, Q9, AILA InfoNet Doc. No. 11030726, http://www.aila.org/content/default.aspx?docid=34775 ; *Revision of NSC Biometrics Reschedule Request Procedures for Reentry Permit Applications*, AILA InfoNet Doc. No. 09061771, http://www.aila.org/content/default.aspx?docid=29271; *AILA Liaison/Nebraska Service Center Liaison Teleconference Q&As* (8/27/09), Q3, AILA InfoNet Doc. No. 09120163, http://www.aila.org/content/default.aspx?docid=30677

procedure now. It would be quite simple for all ASCs to be instructed to follow this procedure.

iii. We understand that it is also possible to provide for the capture of biometrics at consulates abroad. Based upon our discussions with the DHS offices abroad, Service Centers, SCOPS, and the Department of State, we believe that the technology and infrastructure to capture biometrics exists at DHS offices abroad, as well as at the consulates. There appears to be no problem beyond policy to permit the biometrics at DHS offices abroad, and the only barrier to implementing this capability for consulates is the interface of technology to transfer the captured data from the Department of State to USCIS. It would appear that this technology barrier can be easily solved as there currently exists several security systems that are based upon the verification of the biometrics captured by one agency and verified by the other (AILA Doc. Nos. 11041564 and 10120841).[29]

RESPONSE: If the applicant needs expedited processing, the Form I-131 instructions provide specific information for submitting pre-paid express mailers with the Form I-131 for USCIS to send the applicant's receipt and ASC appointment notice, as well as the completed re-entry permit or refugee travel document, if approved. A request for expedited processing should contain the applicant's reasons for such processing so that USCIS may determine whether they qualify for expedited processing.

In addition, if the applicant must attend an ASC appointment in 14 days or less, the applicant may provide an email address or fax number so the Nebraska Service Center will be able to fax the ASC appointment to the applicant. The ASC is willing to accept this duplicate copy of the appointment notice.

If the applicant needs to expedite the I-131 after filing, then the applicant should contact the National Customer Service Center at 1-800-375-5283, or make an INFOPASS appointment at their local office.

13. NSEERS

The recent announcement by DHS that delists all countries from NSEERS special registration is welcome. We would appreciate field guidance confirming offices may now adjust those who were charged with knowing failure to register, and whose adjustment of status applications or other benefits applications were denied or held in abeyance.

RESPONSE: Guidance is being drafted.

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[29] The DHS offices in Rome and Athens have noted in response to AILA inquiries that biometrics can be done in either city, but they will do so only in "compelling circumstances." *See AILA/RDC Q&As with USCIS Athens Field Office,* AILA InfoNet Doc. No. 11041564, http://www.aila.org/content/default.aspx?docid=35142 ; AILA RDC/USCIS Rome District Panel Q&As, AILA InfoNet Doc. No. 10120841, http://www.aila.org/content/default.aspx?docid=33833

14. Asylum Clock and EAD Adjudications

a) After problems giving rise to an applicant-caused delay (e.g. request for continuance to secure additional evidence or to obtain counsel) have been cured, asylum applicants are not able to start or restart their asylum clocks until the next master calendar hearing, if at all, because of court scheduling backlogs. Would USCIS establish a procedure to restart the asylum EAD clock in those instances where part of the delay is a function of court backlogs, and not applicant-caused delay?

Response: USCIS and EOIR continue to explore issues related to the asylum EAD clock. This is one of the issues that has been raised by the public.

b) We ask USCIS to adopt a policy to restart the asylum EAD clock after remand of an asylum application by the BIA or a court of appeals, effective with entry of the order remanding the case by the BIA or the court.

Response: USCIS and EOIR are exploring how the time following a remand should be considered under the asylum clock.

c) Would USCIS consider establishing a "failure without good cause" standard to determine an asylum applicant's eligibility for employment authorization? The regulation currently illustrates the type of delays that may stop the 150-day EAD asylum clock: "delays caused by failure without good cause to follow the requirements for fingerprint processing." 8 C.F.R. § 208.7(a)(2). This regulatory qualification, "without good cause," indicates that not every delay request by the applicant should stop the EAD asylum clock.

Response: The "good cause" standard applies only to delays caused by the applicant's failure to appear for fingerprinting. See 8 C.F.R. §§ 208.7(a)(2); 208.10. The "good cause" standard was added to 208.7(a)(2) when the 1998 interim fingerprint rule was enacted, and was applied only to the situation where an applicant did not appear for required fingerprinting. See 63 Fed. Reg. 12979, 12986 (March 17, 1998).

15. Various & Sundry

a) NCSC Follow Up Protocol

Thank you for confirming that the follow up email addresses can be used after 15 days if there is no response to the NCSC call. However, the website still indicates 30 days. Please advise when you expect the website to be corrected. While we are waiting for the website to be updated, will OPE send a public announcement to alert stakeholders of this policy?

RESPONSE: The update indicating the 15 days was made to the website. Attached is the hyperlink to the information.

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

b) Processing Time Delays

We would appreciate if you could provide any information on efforts to address the I-140 backlogs. At TSC, the posted processing time indicates 11 months for several I-140 categories, and at NSC, the posted processing times are 7 months for several I-140 categories. What efforts are being made to bring the processing times back to the stated goal of four months?

RESPONSE: SCOPS, in conjunction with both the NSC and TSC, has been working to lower processing times at each center. In an effort to address the higher backlog at the TSC, SCOPS initiated the transfer of approximately 1,500 1st and 2nd Preference I-140's to the NSC. Additionally, the NSC and TSC shared best practices which resulted in the formation of "specialized" adjudication groups at each center. These specialized groups will work specific categories of I-140's resulting in higher quality and efficiency. Lastly, SCOPS will be working closely with the NSC and TSC to monitor receipts, case per hour rates, and final actions to determine if each center is staffed appropriately on I-140's. These results will help stabilize workforce FTE's for the upcoming fiscal year. With these initiatives in place, USCIS is confident that we can get processing times back to the stated goals as quickly as possible.

c) CRIS

There continue to be serious problems with CRIS. A high volume of cases do not appear at all in the system, and for those that do, the information is often incorrect. This is a serious problem. For example, an RFE may have been issued, but neither the applicant nor her attorney has any notice. The case may then be denied due to abandonment.

When a file is transferred from one service center to another or to a field office, the CRIS system is updated to indicate that the "file has been transferred." However, it does not indicate to which office it has been transferred – making follow-up difficult. More disconcertingly, it does not provide any further updates on the application status. As with the example above, if an RFE is issued on that case, and CRIS is not updated, the applicant may have no way to know.

In December 2010, we were advised by OPE that:

> The Customer Service Directorate has advised that there is a scheduled release for this weekend that should correct this issue. This has been an existing issue where the some of the action codes entered in the Claims systems did not transfer over to the CRIS system during the daily feeds. Once the release is implemented, we can further review and determine if any issues still exist.

Note that this problem still exists, and as noted above, there continue to be many errors in CRIS.

RESPONSE: Thank you bringing this to our attention. We continue to work on resolving this issue.

16. RFE response times

We greatly appreciate your proposed new guidance on RFE response times (AILA Doc. No. 11071334). [30] Thank you!

[30] *USCIS Interim Memo on Changes to RFE Timeframes*, AILA Doc. No. 11071334, http://www.aila.org/content/default.aspx?docid=36156, http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/change-timeframes-rfe.pdf

ATTACHMENT A: Prima Facie Determinations of Naturalization Eligibility

In follow up to our April 7, 2011 meeting, AILA respectfully requests that USCIS coordinate with ICE and EOIR to establish a process by which a respondent in removal proceedings may obtain an "affirmative communication" from DHS to EOIR regarding the *prima facie* eligibility for naturalization of a respondent in removal proceedings. The regulation at 8 C.F.R. §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 ("IJ") should not terminate a removal proceeding until the IJ receives an affirmative communication from DHS that the individual is statutorily eligible for naturalization. (*See* AILA InfoNet Doc. No. 09030963).[31]

At present, there is no mechanism for this communication. Establishing such a mechanism would be consistent with enforcement priorities of the Department of Homeland Security, and could be modeled after the mechanisms established by ICE and USCIS for the handling of cases of aliens in removal proceedings for whom applications or petitions are pending or have been approved. Memoranda establishing those procedures are these:

1. "Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i): AFM Update AD 11-16," PM 602-0029, February 4, 2011, available at: http://www.uscis.gov/USCIS/Laws/Memoranda/2011/April/guidance-adjudication-remove-proceedings.pdf

2. "Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions," Assistant Secretary John Morton, Policy Number 16021.1, FEA Number 054-14, August 20, 2010, available at: http://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf

There may be concern that 8 C.F.R. §1239.2(f) violates INA §318, the so-called "priority provision," and that USCIS District and Field Office Directors have no jurisdiction to make a *prima facie* determination on naturalization eligibility. INA §318 provides, in part:

> [N]o application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act.

While under INA §318 USCIS may lack jurisdiction to make a final merits determination, it may make a summary determination of *prima facie* eligibility for naturalization. The ultimate question of whether naturalization should be granted cannot be reached until the IJ terminates proceedings, thereby allowing USCIS to then "consider" the alien's application. The IJ however, cannot terminate without a *prima facie* determination of eligibility for naturalization, communicated to the court by DHS.

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

A permanent resident alien seeking a *prima facie* determination of naturalization eligibility must simply assert facts that satisfy the statutory standard. The alien is not required to prove he or she actually meets the standard. That determination will be made by USCIS *only if* the IJ grants the motion to terminate. At the *prima facie* determination stage, USCIS simply considers the elements under 8 C.F.R. §316.2 and determines whether a *prima facie* showing has been made or whether something in the record precludes such a finding.

The October 24, 2005 memorandum on prosecutorial discretion issued by then-ICE Principal Legal Advisor, William J. Howard, encourages ICE counsel to:

> *[C]onsider remand[ing] a case to permit an alien to pursue naturalization.* This allows the alien to pursue the matter with [US]CIS, the DHS entity with the principal responsibility for adjudication of immigration benefits, rather than to take time from the overburdened immigration court dockets that could be expended on removal issues.

In footnote 3, Mr. Howard comments:

> Once in proceedings, this typically will occur only where the alien has shown *prima facie* eligibility for naturalization and that his or her case involves exceptionally appealing or humanitarian factors. 8 C.F.R. §1239.2(f). It is improper for an immigration judge to terminate proceedings absent an affirmative communication from DHS that the alien would be eligible for naturalization but for the pendency of the deportation proceeding. *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975); *see Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003) (Second Circuit upholds BIA's reliance on *Matter of Cruz* when petitioner failed to establish prima facie eligibility.).

The February 4, 2011, USCIS memorandum providing guidance on coordinating procedures for the adjudication of pending petitions and applications for aliens in proceedings outlined elements to be incorporated in an effective Standard Operating Procedure (SOP) for notification to USCIS by ICE that there is an application or petition pending for an alien in proceedings. The principal elements of an SOP for the adjudication of a petition or application for an alien in proceedings offer guidelines for a framework for a request by an alien in proceedings for a *prima facie* determination of eligibility for naturalization. Elements of such a procedure might include:

- The respondent files a motion with the IJ requesting a continuance to allow DHS to review a request for a *prima facie* determination of eligibility for naturalization, to which would be attached a completed Form N-400, Application for Naturalization, with appropriate supporting documentation, supported further by evidence of exceptionally appealing or humanitarian factors.

- Upon finding the existence of exceptionally appealing or humanitarian factors, the IJ may grant the motion for continuance to allow DHS to make a determination of *prima facie* eligibility for naturalization.

- The ICE Office of Chief Counsel (OCC) receives and transmits the N-400 application and supporting documentation to the USCIS local office with jurisdiction over the location of the immigration court where proceedings are being held.

- Each local USCIS office which has an immigration court within its geographical jurisdiction designates a Point of Contact (POC) to receive the N-400 application and supporting documentation for the purpose of making the *prima facie* eligibility determination.

- The USCIS office renders a determination solely of *prima facie* eligibility for naturalization based upon the N-400 and supporting documentation and communicates the determination to the ICE OCC.

- The ICE OCC notifies the IJ of the determination. If USCIS determines that the alien has made a showing of *prima facie* eligibility for naturalization and there are exceptionally appealing or humanitarian factors, the ICE OCC shall move to terminate proceedings to permit adjudication of an N-400 application for naturalization. The respondent shall formally file the N-400 application for naturalization, with supporting documentation and the proper fee, with the filing location designated by USCIS, within an agreed-upon time.

AILA believes that a process along these lines would provide a mechanism by which a qualifying alien could obtain a determination of *prima facie* eligibility for naturalization under 8 C.F.R § 1329.2(f), would not conflict with INA §318, and would be consistent with current DHS enforcement priorities and prosecutorial discretion guidelines.

AILA requests that USCIS discuss this proposal with ICE and with EOIR for the purpose of implementing a process that would allow for the affirmative communication by DHS to EOIR of a respondent's *prima facie* naturalization eligibility.

Attachment B

Please find attached a copy of our May 2011 memorandum.

Attachment C

Relevant INS/USCIS Policy Memos and Letters

10/22/92 Hogan Memo: The mere transfer of the beneficiary to another work site, in the same occupation, does not require the filing of an amended petition provided the initial petitioner remains the alien's employer and, provided further, the supporting labor condition application remains valid. *This language is confusing since (1) there is no procedure in place to "invalidate" an LCA and (2) it is not clear whether "the supporting LCA" must be the LCA submitted with the initial H-1B petition or can be a new LCA filed for the new location.*

8/22/96 Aleinikoff Memo: The mere transfer of the beneficiary to another work site, in the same occupation, does not require the filing of an amended petition provided the initial petitioner remains the alien's employer and, provided further, the supporting labor condition application remains valid. An amended H-1B petition must be filed in a situation where the beneficiary's place of employment changes subsequent to the approval of the petition and the change invalidates the supporting labor condition application. *Again, this language is confusing since (1) there is no procedure in place in the DOL regulations to "invalidate" an LCA and (2) it is not clear whether "the supporting LCA" must be the LCA submitted with the initial H-1B petition or can be a new LCA filed for the new location.*

11/12/98 Letter from Thomas Simmons: An amended H is not needed if the employer has a certified LCA on file for the new location and the alien initially began working at worksite noted on I-129. *This language is confusing since not clear WHEN the certified LCA needs to be on file.*

1998 proposed H-1B rule: If a new LCA is required, then an amendment should be filed. Thus, an amendment would be required if alien is transferred to new MSA. *But this regulation was never promulgated.*

10/23/03 Letter from Efren Hernandez:[32] An amended I-129 is NOT needed due to a geographic move as long as an LCA has been filed and certified for the new location prior to employee's move, the posting has been done, and other wage and hour obligations are met. *This is a clear and simple policy to follow.*

[32] *Amended I-129 Not Required for Move to Location Covered by LCA*, AILA Doc. No. 03112118, http://www.aila.org/content/default.aspx?docid=9661