I. Introduction

AILA acknowledges USCIS' recent change in policy announced in the publication of the memorandum permitting the approval of I-485, I-601, I-687 and I-698 applications where an FBI name check has been pending for more than 180 days.[1] AILA believes the change in policy is a positive step in addressing the FBI name check backlog crisis for pending applicants for adjustment of status.

AILA also wishes to acknowledge the efforts of USCIS to address the serious processing delays caused by the surge in naturalization filings this past summer. AILA is encouraged by the details of the Service's response plan, namely resources devoted to staffing, technology, and process improvements, as detailed by USCIS Director Gonzalez in his testimony on January 17, 2008, before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. AILA is committed to working with USCIS to assist in the implementation of the response plan and to providing suggestions and feedback for further Service improvements. To this end, AILA urges USCIS to expand the February 4, 2008, Aytes Memorandum to permit the final adjudication of I-751 Petitions to Remove the Conditions on Residence and N-400 Naturalization applications where an FBI name check has been pending for more than 180 days.

AILA looks forward to maintaining an ongoing dialogue with USCIS on these issues.

II. Specific Processing/Procedural Issues

1. Extending Duration of Employment Authorization Documents (EADs) Beyond One Year

AILA appreciates USCIS' willingness to investigate multi-year work authorization for adjustment of status applicants. AILA understands USCIS hopes to issue a two-year card to those applicants affected by employment based visa retrogression. Please update us on plans to issue a multi-year EAD as USCIS has discussed in the recent past and as is authorized by the regulations at 8 C.F.R § 274a.12(a).

Response: A multi-year EAD has been proposed for applicants affected by visa regression. This employment validity extension is being considered as part of an initiative to issue a combination "employment and advance parole" authorization. The proposal is under review by USCIS program offices.

2. Extending Duration of Advance Parole (AP) Documents and Extending AP Issued Forms I-94

AILA also appreciates USCIS' willingness to investigate multi-year travel authorization for adjustment of status applicants. AILA understands that USCIS is reviewing a number of options including issuing a multi-year combined EAD/AP document similar to the document provided to legalization applicants in the past. Please update us on discussions regarding the feasibility of issuing a multi-year advance parole document, as well as discussions regarding the feasibility of issuing a combined EAD/Advance Parole document.

Response: A standard one-year advance parole is under discussion for adjustment applicants. A multi-year standard parole has been proposed for applicants affected by visa regression. In addition we are testing a combination document to serve as both an EAD and advance parole where both have been requested and are appropriate.

3. Extending an AP issued Form I-94

a. AILA once again asks USCIS to provide a mechanism to extend an advance parole Form I-94 issued at the time of entry. Currently, pending applicants for adjustment who use a valid advance parole to re-enter the United States are issued an I-94 for a one year period. Under recently-adopted regulations of the DHS implementing REAL ID, aliens may not be able to obtain or renew REAL ID compliant state driver's licenses and non-drivers licenses without providing an unexpired Form I-94 as proof of maintenance of status.[2]

Response: USCIS is not weighing presently any initiatives to extend the I-94 validity period. Under the Federal Register RIN 1601-AA37, "Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes," the document list provided in the proposed regulation and adopted under this final rule relates to demonstrating identity **only**, and not lawful status in the United States. The DHS agreed with those who suggested in their comments that any document verifiable by SAVE should be acceptable for proving lawful status, and the final regulation provides the same. Such documents may include the Forms I-797 and I-94, which provide sufficient information for a State Department of Motor Vehicles to check SAVE.

---

[1] Memorandum from Michael Aytes, Associate Director, Domestic Operations, *Revised National Security Adjudication and Reporting Requirements*, HQ 70/23 & 70/28.1 (February 4, 2008)("Aytes Memorandum")

[2] See, e.g., 6 C.F.R. § 37.11(c)(vi) and (g)(2); 73 Fed. Reg. 5272, et. seq. (Jan. 29, 2008).

b. AILA requests that USCIS confirm in a policy memorandum that an individual whose application for adjustment of status remains pending is lawfully present in the United States regardless of the fact that the individuals advance parole related Form I-94 may have expired.

Response: No unlawful presence begins to accrue upon the expiration of an I-94 where the subject of the I-94 has an I-485 properly pending before USCIS.

We will review whether your concerns warrant clarification in the form of a policy memorandum.

4. Cap Issues Relating to Chilean/Singaporean Nationals

AILA respectfully requests that USCIS confirm that a Chilean or Singaporean national who has been issued an H-1B1 visa or has been approved for change to H-1B1 status in the United States has been counted against the overall H-1B cap for that fiscal year. A January 8, 2004 memorandum from William Yates memo confirms this but it does not instruct on the mechanics of capturing that H-1B number.[3]

Please confirm that a subsequent H-1B petition on behalf of an individual who has held H-1B1 status is cap exempt, as that person has already been counted against the cap. This question was raised in AILA's fall 2006 liaison meeting with USCIS, and USCIS indicated it would put out guidance on this issue. To date, no formal guidance has been issued.

Response: We appreciate your request and will take this matter under advisement.

5. Diversity Visa (DV) Lottery: 245 Application Processing

On January 19, 1999, legacy INS issued a memorandum in which it permitted applications for adjustment of status under the DV program to be filed 90 days in advance of an applicant's rank cut-off.[4] The Pearson memorandum was issued in response to notification from the Department of State (DOS) that the Visa Bulletin would provide cut-off numbers for the DV category 90 days in advance. The memorandum instructed all offices to accept DV related adjustment of status applications for processing "any time during the 90-day period preceding the cut-off provided in the Visa Bulletin." The current version of the DOS' Visa Bulletin lists lottery rank number availability only for the current and following month. As such this mechanism now provides a DV applicant 75 days advance notice, 15 days short of the previously afforded 90 day period.

AILA has received reports from members that the advance filing policy articulated in the Pearson memorandum is not being followed by the Chicago lockbox resulting in rejection of DV adjustment of status applications. AILA respectfully requests that USCIS confirm that the advance filing procedure outlined in the 1999 Pearson memorandum is still in place and requests that HQ advise the Chicago Lockbox accordingly.

Response: An alien may apply for adjustment when a visa number is immediately available. Under the Pearson memorandum, USCIS deemed an IV number to be immediately available based on the publication of a rank order number. Therefore the date of publication by DOS of the visa bulletin controls the date on which USCIS will begin accepting adjustment applications made under the DV program for a given fiscal year. When the above memorandum was published in 1999 the visa bulletin was be published 3 months in advance. The memo has been overtaken by events in that DOS changed publication of the visa bulletin publication to 2 months in advance. USCIS is constrained by DOS's visa bulletin publication policy.

6. Increasing K-3 Processing Efficiency

AILA respectfully requests USCIS to review and revise K-3 processing procedures to permanently permit concurrent filing of the I-130 and I-129F petitions and to permit a beneficiary to move forward with a K-3 visa application in those cases where the I-130 petition is approved prior to adjudication of the I-129F petition. Please see the attached **Addendum I** to this agenda for AILA's recommendations on this issue.

---

[3] Memorandum from William R. Yates by Janis Sposato, Associate Director of Operations, USCIS, "*Lifting of Numerical Cap on Mexican NAFTA Nonimmigrant Professionals (TN) and Free Trade Agreements with Singapore and Chile*," (January 4, 2004), states "The annual 6800 H-1B1 numerical cap will be counted against the H 1B numerical cap... In addition to initial admissions at ports-of-entries, initial changes of nonimmigrant status to H-1B1 classification will be counted towards this overall annual limitation." http://www.uscis.gov/files/pressrelease/NAFTA010804.pdf

[4] Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, *Acceptance of DV-related I-485 Applications During 90-day Period Preceding Cut-Off Number in the Visa Bulletin,* HQ 70/23.1 (January 19, 1999)("Pearson Memorandum")

Response: USCIS appreciates AILA's recommendations regarding these K-3 issues and will take them into account as we review current policies and procedures.

7. Use of Form I-102 to Request Action on a Form I-94 Issued by CBP

Historically individuals filed Form I-102 with USCIS to replace a lost I-94 card issued by CBP at entry. The advisory contained in the updated instructions to Form I-102 however states:

> Do not use this form to request an action on a Form I-94 issued by the U.S. Customs and Border Protection (CBP). If you are seeking a new Form I-94 based on a Form I-94 issued at a port-of-entry or otherwise by CBP, you should contact the nearest CBP office or port-of-entry and inquire about their procedures, or visit the CBP's website atwww.cbp.gov.

Based on the wording of the advisory it appears that filing Form I-102 with USCIS is no longer a viable option to replace a CBP issued Form I-94.

a. AILA requests clarification on the new instructions and advisory. Specifically, please advise whether USCIS will still accept and issue replacements for lost I-94s that were issued upon entry and if not, the reasoning behind the change in procedure. Please note that CBP has indicated to AILA that it is only able to replace cards containing CBP-created errors.

Response: USCIS will accept and issue replacements for lost I-94s that were issued upon entry, and will revise the Form I-102 instructions.

b. If USCIS will not replace a CBP-issued I-94 card and will not accept an I-102 filed with an I-485 where proof of inspection and admission is required, will the Service accept as proof of valid entry for adjustment of status purposes a printout from CBP, obtained through FOIA, showing time and date of entry?

Response: USCIS will replace a Form I-94 issued by the CBP except where requests seek correction of determinations made by CBP that the holder may perceive as an error.

c. The special instructions listed on USCIS' website and included in the instructions to Form I-102 indicate that applicants should submit applications to request a correction to an inaccurate Form I-94, I-95 or I-20ID at the local office having jurisdiction over the alien's temporary residence. Please describe what if any instructions have been provided to USCIS Field Offices for accepting and processing Form I-102.

Response: The above instructions are incorrect and will be revised.

d. The Form I-102 instructions also indicate that the form I-102 can be used to correct an I-94 for errors made either by USCIS or the applicant. AILA members have reported rejection of Form I-102 for correction of applicant errors. Please confirm that Form I-102 can be used to correct I-94 errors made either by the Service or by an applicant.

Response: The I-102 may be used to correct I-94 errors made by either the applicant or USCIS. Please note, however, that any request to correct an I-94 error made by an applicant must be accompanied by the correct filing fee. A request to correct an I-94 error made by USCIS must be accompanied by supporting evidence.

8. Filing Form I-130 Petitions for Beneficiaries in Removal Proceedings

On February 19, 2008, USCIS announced that effective immediately all petitioners filing stand alone Form I-130s must file their petitions with the Chicago Lockbox instead of a USCIS Service Center. The new instructions do not provide a separate procedure for filing I-130 Petitions for those beneficiaries currently in removal proceedings. AILA urges USCIS to create a mechanism for I-130 Petitions filed on behalf of beneficiaries in removal proceedings to be flagged and separated in the filing process for timely adjudication. Please find AILA's arguments and recommendations on this issue in the attached **Addendum II** to the agenda.

Response: The recent I-130 filing instructions only changed the filing location of stand-alone filings from the Service Center to the CLB. These revised filing instructions did not alter any pre-existing filing procedures for beneficiaries in removal proceedings.

Due to a number of practical and operational considerations, it is not possible for USCIS to adopt AILA's suggestion at this time. However, we will consider whether the petition should be modified in order to flag removal proceedings.

9. Standard Operating Procedure for Filing I-130 Petitions for Beneficiaries in Removal Proceedings with Final Orders of Removal

AILA requests that USCIS clarify the standard operating procedure for I-130 petitions for those individuals with final orders of removal. Typically I-130 petitions filed on behalf of individuals with final orders of removal are forwarded to USCIS Field Offices for interview. AILA has received reports from members that individuals with final orders of removal are routinely detained at the time of their I-130 interview. AILA understands USCIS position that it has a duty to carry out the immigration laws including not turning a blind eye to those applicants with final orders of removal. The current policy at some Field Offices, however, is having a chilling effect on those individuals who would otherwise be able to apply for forms of relief and reopen their final orders of removal. In many jurisdictions it is difficult to have a motion to reopen adjudicated without an approved I-130 petition. AILA further understands that a higher burden is required to be shown to be granted a benefit when an individual has a final order of removal. In the past, the higher burden was able to be demonstrated via paper at the request of the service center. In light of the new filing procedures for I-130's what will be the standard operating procedures for these scenarios?

Response: This is currently under review at the HQ level. Further instructions will be forthcoming.

10. Expansion of Premium Processing

a. Is there any update on when USCIS will reinstate premium processing for I-140 and R-1 petitions?

Response: On January 8, 2007, USCIS issued a press release (that is available on our website) announcing that the suspension of premium processing service for religious worker (R-1) petitions will extend at least until July 8, 2008.

b. If USCIS is not able to reinstate premium processing of I-140 petitions in the near future AILA urges the Service to permit premium processing for those beneficiaries who are able to demonstrate the need for an I-140 approval to remain in H-1B status under the Service's current reading of AC21 §104(c). AILA recommends permitting the acceptance for premium processing the I-140 petitions for those beneficiaries that will time out of H-1B status within 120 days and are eligible for an extension of stay under AC21 §104(c). AILA urges USCIS to permit premium processing for this discrete group of individuals given the current processing backlogs and the dire consequences to those beneficiaries who would be eligible for extensions of H-1B stay under AC21 §104(c) but are unable to have their I-140 petitions adjudicated timely.

Response: USCIS is reviewing various options related to the restoration of premium processing for different I-140 petitions-types. The USCIS must weigh the ramifications of favoring one I-140 petition-type over another for expedited service.

Our service centers are working hard to reduce the current backlog of I-140 petitions and training additional staff to adjudicate them. We plan to resume premium processing for this application type once we feel confident that our service centers will be able to deliver the kind of adjudication and customer service required by the program.

c. Is USCIS currently contemplating including premium processing of I-140 petitions filed under the EB-1-3 preference category?

Response: USCIS is not planning presently to extend premium processing beyond any previously designated categories at this time.

d. AILA respectfully renews its request that USCIS expand the premium processing program to include E-3 Australian and H-1B1 Singaporean and Chilean and nonimmigrant visa categories. Although direct filing of E-3 and H-1B1 visa applications is permitted at US Embassies and Consulates abroad, it is not always feasible for petitioners and beneficiaries to make visa appointments in a timely and cost-effective manner for initial grants or for extensions of stay of E-3 or H-1B1 status. The unavailability of premium processing is particularly acute for E-3 nonimmigrants, as there is currently no provision for an E-3 nonimmigrant to continue to be employed by a petitioner once a timely filed E-3 extension of stay petition has been filed.[5]

[5] The relevant regulation contained at 8 CFR 274a.12(b)(20) does not include E-3 nonimmigrants in the class of individuals permitted to continue to be employed once a timely extension of stay petition has been filed with USCIS and the current period of stay has expired.

Response: We understand AILA's desire to expand premium processing to various other nonimmigrant classifications. As we reduce processing times and eliminate the temporary backlogs of applications created by last year's surge, we hope to expand premium processing, and will consider proposing regulations where necessary to allow for such expansion.

11. Request for Clarification of Various Issues in the I-9 Handbook

a. **Good Faith Defense and Compliance**

In 1996 Congress amended the INA to provide a good faith defense, despite a technical or procedural failure, if there was a good faith attempt to comply with the I-9 verification rules. See INA § 274A(b)(6), as added by Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IRAIRA), Pub. L. No. 104-208, § 411, 110 Stat. 3009. The newly revised Handbook for Employers does not explain what "technical or procedural" I-9 failures are; nor does it explain "[A] good faith attempt to comply".[6] The public has relied on the March 6, 1997, legacy INS Interim Guidelines, for guidance on these compliance issues. May the public continue to rely on the Interim Guidelines for compliance guidance until a final rule is published?

Response: We appreciate your concerns and are in the process of reviewing this matter in depth.

b. **The 240 Day Rule**

Aliens in certain nonimmigrant categories are authorized to continue working for the same employer for a period not to exceed 240 days after the expiration of their current period of stay, as long as a timely filed extension of stay application is pending with the USCIS. 8 C.F.R. § 274a.12(b)(20). Under this rule employment must cease upon notice of a denial decision. For I-9 reverification purposes, the employee in this case is employment authorized but the I-9 form contains no provision for this form of authorization. Which employer reverification procedures would suffice?

Response: We appreciate your concerns and are in the process of reviewing this matter in depth.

c. **H-1B Portability**

Section 105 of the American Competitiveness in the 21st Century Act of 2000 (AC21), allows employers to hire employees who were previously issued an H-1B visa or change of status, who subsequent to a lawful admission have not been employed without authorization by filing a "nonfrivolous" H-1B transfer petition with the USCIS before the expiration of the alien's previous authorized stay.[7] The employment authorization continues until the petition is adjudicated and must cease if the petition is denied. Please advise whether the USCIS-issued receipt notice qualifies as a List C employment authorization document documents for I-9 verification or reverification purposes.

Response: We appreciate your concerns and are in the process of reviewing this matter in depth.

III. General Processing/Procedural Issues

12. Lockbox Expansion

a. USCIS' response plan to address the naturalization surge includes centralization of intake of naturalization applications to a lockbox. When does USCIS anticipate implementing this change?

Response: As part of our ongoing efforts USCIS plans to shift intake of naturalization applications to the lockbox. We are projecting this will be implemented in September, and will announce implementation as preparations are finalized.

---

[6] Handbook for Employers, Form M-274, Rev. 11/01/2007) N at page 17
"e. Good faith defense
If the employer can show that he or she has in good faith complied with the Form I-9 requirements, then the employer has established a "good faith" defense with respect to a charge of knowingly hiring an unauthorized alien, unless the government can show that the employer had actual knowledge of the unauthorized status of the employee.
A good faith attempt to comply with the paperwork requirements of Section 274A(b) of the Act may be adequate notwithstanding a technical or procedural failure to comply, unless the employer has failed to correct the violation within 10 days after notice from DHS, or the employer is engaging in a pattern or practice of violations."

[7] INA §214(n), 8 USC §1184(n).

b. Is USCIS contemplating centralizing the filing of any other petitions or applications in the near future? When does USCIS anticipate publishing in the Federal Register official notice of the centralization of I-130 petitions at the Chicago Lockbox?

Response: We plan to shift all intake of applications to lockboxes over the course of the next 2 years. After the shift of naturalization receipting later this year the next planned transition will be adoption petitions.

We also plan to publish a regulation to remove all references to filing locations so that changes in filing and processing can be done simply by modifying the associated forms and information.

13. Re-engineering the H-1B cap filing and receipting processes.

a. Please update AILA on current plans for re-engineering the H-1B cap filing and receipting processes.

b. What effect did the centralization of cap-exempt filings at the CSC have on the overall management of the H-1B cap this year? Do you foresee retaining H-1B cap exempt filings at the CSC?

c. Is USCIS considering a pre-registration program in order to conduct the lottery prior to receiving H-1B petitions for adjudication?

Response: There is no concrete data as of this time regarding the effect of the centralization of cap exempt petitioners at CSC. USCIS is considering a pre-registration program for purposes of conducting the random number generator selections for prospective H-1B employers in advance of the formal April 1st filing date. The program is in its formative stages and we have no details as to how it will ultimately be executed. Ideas as to how a pre-registration program could best be implemented would be welcome.

14. Staffing Updates

Please provide an update on the progress of USCIS' staffing initiatives and, if possible, please provide further details regarding any changes in USCIS' training program.

Response: A critical component of the strategy to address the workload is to quickly grow our workforce. New resources from the 2007 fee rule will support the hiring of 1,500 new employees, and the revenue from fees associated with applications field this summer is funding an additional 1,800 Federal and contract employees. USCIS is in the midst of an aggressive adjudicator hiring campaign, which began in October 2007. Two recent adjudicator job announcements provided a combined pool of more than 31,000 applications for base, fee rule and surge positions. We have hired 442 permanent full-time adjudicators since the beginning of this fiscal year. All tolled, we are planning to hire at least 720 adjudicators as part of our fee rule initiative and more than 570 adjudicators based on surge funding. As of March 1, 2008, there are 869 Adjudication Officers in the selection process. Of the 869 selections, 361 are scheduled to enter on duty in the near future. By actively exploring all options to fill these positions as quickly as possible, we have proactively contacted USCIS employees who have retired in the past three years. Through this effort, we have garnered interest form numerous former employees whose interest in becoming re-employed annuitants is being coupled with appropriate positions in various locations. Selecting officials are now working with the interested individuals to complete the process. Senior agency leadership holds weekly meetings to closely monitoring al hiring and training initiatives.

15. Website

a. Please describe any upcoming updates and enhancements to the USCIS website.

Response: At this time, USCIS is planning only one major update to USCIS.gov, which involves a Spanish-language version of the website, scheduled for the first quarter of FY09. We are also looking at minor revisions to our information architecture which will have the effect of "flattening" the services and benefits portion of the website.

b. What is the status of USCIS taking complete control of the CRIS (online case status) system from ICE?

Response: We are projecting the movement of CRIS and other products from the ICE data center to the USCIS data center that will take approximately 18 months to complete.

c. Has USCIS been able to integrate the stand alone AR-11 database with the Service Management Request Tool?

Response: Currently there are no plans to integrate stand alone AR-11 with the Service Request Management Tool (SRMT).

d. AILA renews its request that the processing times for the E-3 Australian and H-1B1 Chilean and Singaporean Free Trade nonimmigrant categories be added to the USCIS website. No mechanism continues to exist for petitioners to gauge the processing times for E-3 H-1B1 petitions. In addition, AILA requests that USCIS add I-129F K-3, U and T petitions processing times to its website.

Response: Thank you for these requests; the suggestions involve considerable changes to our systems and have been submitted for review and analysis.

e. AILA respectfully requests that USCIS expand the capacity of the online portfolios. Currently the online case status portfolios on USCIS' website only permit users to input and hold information for 100 items. Capacity expansion is especially crucial in light of the large number of adjustment of status applications that will remain pending for many years that were filed under the FY07 Visa Bulletin. Due to the limit of a portfolio of 100 receipt numbers per representative account, some representatives are compelled to store receipt numbers under multiple accounts. Having to access multiple accounts is time consuming and creates unnecessary additional traffic to USCIS' website. Frequent use of the USCIS online status feature sometimes results in denial of service.[8]

Response: As a result of multiple requests from various entities, USCIS will be increasing the capacity of the online portfolios to two hundred (200). Please allow us sufficient time to update our tables and make the changes, which you should notice in the very near future.

f. Accessing the USCIS online status provides information on updates that do not result in an email via the account. This increases the likelihood that representatives will also use the online status feature to check on case status. AILA respectfully requests that USCIS expand the number of actions that result in an email via the account (e.g. transfer of a file to a different Service Center or Field Office; scheduling of biometrics; notice that a document has been returned as undeliverable).

Response: Thank you for these requests; the suggestions involve considerable changes to our systems and have been submitted for review and analysis.

16. Expansion of Best Practices

AILA renews its request that USCIS consider expanding the CSC model of direct e-mail address access to include the other Service Centers for purposes of resolving discrete problems including, but not limited to the following:

a. Service errors on approval and receipt notices, employment authorization documents, and advance parole documents;
b. Separation of related cases; documents not received when the online status system indicates that such documents have been sent;
c. A response to an RFE submitted more than 30 days ago when the case remains unadjudicated; and
d. Change of counsel notices.

AILA members report general satisfaction with the CSC Division XII e-mail process to resolve relatively straightforward process and procedural issues. AILA believes the use of dedicated email addresses at the four Service Centers would assist the NSCS in handling easily resolved issues.

Response: We agree that managed e-mail access to identify certain kinds of issues at our service centers would be beneficial, and are looking at developing standardized e-mail access for certain kinds of requests.

17. Role of the FAQ

[8] The following is the message received by users who are locked out of the portfolio system: "It was reported to us that your IP address or internet gateway has been locked out for a select period of time. This is due to an unusually high rate of use. In order to avoid this issue please take this opportunity to create a Customer account (single applicant) or a Representative account (representing many individuals, such as lawyers, charitable groups, or corporations). Each account allows you to generate a Portfolio of receipt numbers. Building a portfolio containing your receipt number(s) eliminates your need to manually enter the receipt number and extract each case status. You will automatically be emailed changes to each case as updates occur. This email notification will occur within 12 to 24 hours of any progress made for every receipt number contained in your portfolio. There is no lockout feature associated with your portfolio and there is no wasted time on your part checking a receipt number where no advancement has been made."

The Frequently Asked Questions (FAQs) posted on USCIS' website are valuable tools for stakeholders and the Service Centers. What mechanisms are in place for the FAQs to be disseminated, discussed, and followed at all levels of the Service? Please describe the relationship between FAQs, USCIS updates, and policy memoranda.

Response: FAQs are distributed to all USCIS employees through various internal methods. Although intended to be informative, FAQs and Updates are not considered policies, but guidance aimed at clarifying a specific policy, regulation or change in law.

IV. Regulations/Guidance/Policy

18. Regulations

Please provide an update on the status of regulations regarding the following: AC21, CSPA, T regulations for adjustment of status, EB-5, and religious workers.

Response: The AC21 rule and the EB-5 Special Class rule are both undergoing revision and should be published in the near future. The Child Status Protection Act (CSPA) regulation is currently in the USCIS clearance process. The T and U Adjustment of Status regulation is pending clearance with DHS.

19. 245(k) guidance

Please provide an update on the status of further guidance regarding the application of 245(k) of the Immigration and Nationality Act.

Response: The memorandum is currently in the USCIS concurrence process.

20. Work Authorization Under VAWA

What is the status of the memorandum that addresses I-765 processing for those eligible under VAWA 2005, including the issues related to work authorization for spouses of A and G nonimmigrants?

Response: The memorandum is currently in the USCIS concurrence process.

21. *Matter of Perez-Vargas*

USCIS indicated in the official Q&A released after our fall 2007 meeting that the goal of the Department is to provide "proper guidance and mechanisms, regardless of jurisdiction, for individuals to have their 204(j) claims resolved when renewing an adjustment of status application in removal proceedings." USCIS further indicated that different options were being considered in furtherance of this goal. Can the Service report any progress made on this issue and whether guidance will be released in the near future?

Response: Guidance on this issue will be forthcoming in the near future.

22. VAWA and *Perez-Gonzalez* / I-212 Memo

At the conclusion of our fall 2007 meeting, USCIS indicated that a memorandum had been drafted and was in the formal clearance process related to I-212 adjudications for VAWA self-petitioners. What is the status of this guidance?

Response: The memorandum is currently in the USCIS concurrence process.

23. Child Status Protection Act (CSPA)

What is the status of the updated guidance on CSPA addressing the holding in Matter of Rodolfo Avila-Perez, 24 I&N Dec. 78 (BIA 2007)? USCIS indicated at the conclusion of our fall 2007 meeting that this guidance was drafted and in the formal clearance process.

Response: The memorandum is currently in the USCIS concurrence process.

24. "Moonlighting" Under EADs

AILA requests clarification on whether an H-1B or L-1 nonimmigrant present in the United States under a valid petition and who moonlights pursuant to an EAD still maintains his H-1B or L-1 status. It is AILA's belief that an H-1B or L-1 nonimmigrant who maintains employment with his or her petitioner and "moonlights" with a different employer on the basis of an approved EAD continues to maintain his or her underlying nonimmigrant status. Please see the attached **Addendum III** for AILA's arguments in support of this position.

Response: We appreciate your request and will take this matter under advisement.

25. Travel Without Advance Parole for E-1, E-2, E-3 and O-1 Nonimmigrants With Pending Applications for Adjustment of Status

AILA renews our request that the Service consider putting forth on an expedited basis the regulatory change necessary to enable E and O visa holders with I-485 applications pending to travel on their E or O visas without abandoning their I-485 applications. Our proposal is outlined in detail in **Appendix IV**.

Response: USCIS appreciates the impact on the business community and has taken the request under advisement. We hope to promulgate regulations in the future, but are now focusing our limited resources on other DHS priorities.

26. Travel and Applications for Advance Parole

AILA requests clarification on issues relating to travel and applications for Advance Parole. Specifically, please confirm:

a. That an H-1, H-4, L-1, L-2, K-3, K-4, V-1, V-2, or V-3 nonimmigrant that is in possession of a valid nonimmigrant visa for reentry into the U.S. need not be present in the United States when he or she files for an advance parole document.
b. Please also confirm that an individual whose current advance parole document is still valid when he or she files for a new advance parole document is not required to be present in the United States when that new application is filed.

Please see the attached **Addendum V** for an expanded discussion of this issue.

Response: Advance parole granted to those outside the U.S. is an extraordinary measure used sparingly to bring an otherwise inadmissible alien to the U.S. for a temporary period due to a compelling emergency or significant public benefit. It is not to be used to circumvent the normal visa issuance process. Advance parole that is sought to preserve the pendency of an I-485 application must be applied for and granted before the alien's departure from the U.S.

If the above non-immigrants filed adjustment applications prior to departing the U.S., they need not also have filed for advance parole where they have a valid NIV that may be presented at a port of entry. This of course assumes these same individuals have maintained their status (8 CFR 245.2(a)(4)(ii)(C) and(D)). If, however, they have failed to maintain their non-immigrant status, advance parole must have been granted prior to their departure from the U.S. or their adjustment application shall be deemed abandoned. If an H or L non-immigrant with a pending adjustment application appears at a port of entry and presents both an I-512 and his/her valid NIV, CBP should advise the alien that he or she must choose whether to use the H or L visa or the advance parole document.

27. EB-5 Investor Program

a. The EB-5 immigrant investor regional center pilot program is currently set to expire on September 30, 2008. AILA urges USCIS to issue policy guidance addressing how I-526 and I-829 petitions, adjustment applicants, and conditional residents will be treated after the sunset date if Congress fails to expand the pilot program by September 30th. AILA recommends USCIS adopt a policy that a timely filed application remains valid for adjudication and approval notwithstanding expiration of the pilot program set to expire on September 30, 2008. Please see AILA's arguments and recommendations in support of this policy in the attached **Addendum VI** to this agenda.

Response: USCIS is mindful that the pilot program is due to sunset on September 30th of this year. It appears that Congress is moving to resolve the issue of concern as to the program being extended beyond the sunset date. USCIS program managers have also been in contact with counterparts in the Department of State Visa Office to ensure that the two agencies are consistent in handling either visa applications or adjustment of status applications with respect to immigrant investors whose I-526 has been approved. USCIS believes it to be premature at this point to issue policy guidance, but will do so if the sunset of this provision becomes likely.

b. AILA renews its request that USCIS provide a list of approved and operating regional centers. At the conclusion of our fall 2007 USCIS indicated the list would be made available in the near future.

Response: USCIS did in fact provide such a list of operating regional centers to the Chair of the AILA EB-5 committee in November of 2007. The list of operating regional centers will be updated and posted and then henceforth kept up to date on our website.

c. Has USCIS completed FY07 reporting? If so, when does it anticipate being able to publish the statistics related to I-526 and I-829 petitions, approved and denied for the last fiscal year?

Response: No. USCIS has not completed its FY07 report. We will provide this data as soon as it is available.

d. AILA requests clarification of the term "reasonable period of time" for job creation required under 8 CFR 216.6(a)(4)(iv). 8 CFR 216.6(a)(4)(iv) states that an I-829 applicant must submit evidence that the alien created or can be expected to create "within a reasonable time" 10 direct or indirect jobs. Would an individual be able to meet the reasonable period of time standard by providing a detailed business plan showing that the jobs will be created within the next two years? One year? What if 5 jobs have been created by the time the I-829 has been filed? What type of evidence would USCIS require in the event that no or few jobs have been created?

Response: USCIS expects in the vast majority of cases that all of the requisite jobs have been created by the time the I-829 is adjudicated. However, the regulations at 8 CFR 216.6(a)(4)(iv) do contemplate certain circumstances in which the requisite jobs can be created within a "*reasonable period of time.*" Nonetheless, a favorable adjudication of the I-829 without the requisite jobs having been actually created would be the exception rather than the rule.

USCIS cannot articulate a bright line rule to define what constitutes a "*reasonable period of time*" as such period will depend on the factors of each individual case. USCIS will consider all appropriate evidence that would (a) clearly justify not having completed the job creation by the end of the two years of conditional residence (e.g., the nature of the investment, the industry involved, etc.) and (b) show that the full number of requisite new jobs will be created within a clear, defined and credible period of time.

28. K-2 Adjustment of Status

AILA has previously submitted arguments and documentation to support its position that a K-2 dependent remains eligible to adjust status to permanent residence after the dependent reaches the age of 21, provided he obtained the K-2 visa prior to age 21. On December 21, 2007, the United States District Court for the Northern District of California issued a decision regarding a K-2 holder's eligibility to adjust status despite turning 21 prior to the adjudication of the application.[9] AILA respectfully renews its request that USCIS reconsider its interpretation of the eligibility of K-2 visa holders to adjust status after reaching 21 years of age. Additional background and arguments are provided in the attached **Addendum VII**.[if you still need a reply – simply indicate OCC is willing to examine the issue.]

Response: We will consider your suggestions.

29. Conditional Permanent Residents who have not finalized divorce proceedings at the time of I-751 filing

At the conclusion of our fall 2007, meeting USCIS indicated it would review and consider AILA's arguments in favor of an administrative remedy which would protect the status of conditional permanent residents who had not finalized divorce proceedings at the time of I-751 filing. AILA's proposal seeks to eliminate the risk of a lapse in status and accrual of unauthorized presence for those individuals with bona fide approvable I-751 waiver cases, as well as to eliminate the tremendous unnecessary additional workload for DHS and EOIR personnel resulting from such individuals being placed in removal proceedings. AILA respectfully renews our request that USCIS review this issue and revise guidance to implement our recommendation on this issue. Please see the attached **Addendum VIII** for AILA's recommendations on this issue.

Response: We are still considering this option and will report as soon as USCIS makes a decision.

[9] *Verovkin v. Still,* 2007 U.S. Dist. LEXIS 93904 (N.D. Cal, December 2007).

30. Expansion of the Application of the Holding in Freeman v. Gonzales

AILA urges USCIS to reconsider its decision to limit *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) to cases arising in the 9th Circuit. Soon after issuance of the memorandum limiting application of *Freeman* to the 9th Circuit[10], U. S. District Courts in Massachusetts and Ohio issued orders following Freeman.[11] In addition to *Freeman*, *Taing*, and *Lockhart*, the U.S. District Court in New Jersey found in favor of a widowed beneficiary in May of 2007.[12]

In the memorandum limiting the application of *Freeman* to the 9th Circuit, USCIS recites the arguments in support of the proposition that a petition for a spouse cannot be approved after the death of the spousal petitioner. USCIS notes that regulations authorize conversion of a spousal I-130 to a widow(er) I-360 upon death of a petitioner if the parties have been married for two years at the time of the petitioner's death[13] and that regulations authorize USCIS in its discretion to reinstate a petition if the petitioner dies after approval of the petition[14] These regulatory provisions, and underlying statutory authority, provide compelling humanitarian relief to individuals who have lost the closest of their loved ones, their spouses, often in tragic circumstances.

The Ninth Circuit in Freeman has provided the USCIS with the basis to afford alien beneficiaries whose spouses have been taken from them in similar circumstances the same compelling humanitarian relief afforded to those whose marriages had existed two years, or to those fortunate enough to have had their petitions favorably decided prior to the petitioner's death. AILA suggests that the number of individuals who could become eligible for permanent residence will be mercifully small. The better course for USCIS is to adopt the reasoning of the *Freeman* court, as have three other district courts thus far, and apply the humanitarian principles of *Freeman* nationwide.

Response: It is not appropriate to comment on this question, because the issue presented is currently being litigated in the First (*Taing)*, Third (*Robinson*) and Sixth (*Lockhart*) Circuits, as well as in the Central District of California (*Hootkins*). The USCIS position concerning the *Freeman* opinion is stated in the November 8, 2007, memorandum and in the Government briefs filed in these cases.

31. 204(j) Portability for National Interest Waivers (NIW) Adjustment Applicants

In the wake of *Schneider v. Chertoff*, 450 F.3d 944 (9th Cir. 2006), USCIS issued interim guidance to the field for adjudicating national interest waiver petitions and related adjustment of status applications under INA § 203(b)(2)(B)(ii).[15] Included in the Schneider Memorandum is a section about adjustment of status portability as it pertains to NIW physicians. The Memorandum provides:

> (F) Portability. USCIS is statutorily required to allow the filing of an adjustment application before the completion of the medical service requirement that is a statutory prerequisite to approval of adjustment. See section 203(b)(ii)(II) of the Act. *The provisions of the INA section 204(j), concerning I-140 portability in the event USCIS takes longer than 180 days for adjudicate an adjustment application, do not apply to NIW physicians.* (Emphasis added.)

While it is clear that a physician seeking a NIW under § 203(b)(2)(B)(ii) must complete his five year service obligation before his adjustment of status application may be approved, please confirm that the Schneider Memorandum's bar on adjustment of status portability applies only **before** the service obligation is complete. Clearly, once the physician with an approved I-140 petition has completed the required five years of service, he may change jobs pursuant to the portability provisions of INA § 204(j). (We are assuming that the physician would still notify the USCIS that he has complied with the service obligation no later than 120 days after the service requirement has been fulfilled.)

---

[10] *Effect of Form I-130 Petitioner's Death on Authority to Approve the Form I-130*, Michael Aytes, Associate Director of Domestic Operations, November 17, 2007, HQDOMO 130/1.3 / AFM Update AD08-04

[11] *Taing v. Chertoff*, CA No. 07-10499-WGY, D. Mass., December 12, 2007, and *Lockhart v. Chertoff*, Case No. 1:07CV823, U.S.D.C, N. Dist. Ohio, January 7, 2008.

[12] *Robinson v. Chertoff*, CA No. 06-5702 (SRC), D. N.J., May 14, 2007.

[13] 8 C.F.R. § 204.2(i)(1)(iv) and 205.1(a)(3)(i)(C)(1)

[14] 8 C.F.R. § 205.1(a)(3)(i)(C)(2)

[15] Memorandum from Michael Aytes, Associate Director, Domestic Operations, *Interim guidance for adjudicating national interest waiver (NIW) petitions and related adjustment applications for physicians serving in medically underserved areas in light of Schneider v. Chertoff, 450 F.3d 944 (9th Cir. 2006) ("Schneider decision")* , HQ 70/6.2, AD06-46 (Jan. 23, 2007) [hereinafter Schneider Memorandum] .

AILA requests clarification because the Schneider Memorandum does not address the question of adjustment of status portability *after* the five year service obligation has been fulfilled. The following is an example that illustrates the issue: An Indian national physician seeking a NIW filed his I-485 in March 2003, when visa numbers were available. He has now fulfilled his five-year service obligation, and his I-485 remains pending. However, visa numbers are now unavailable for Indian nationals in the EB-2 category. AILA believes this physician should be permitted to avail himself of the adjustment of status portability provisions of the Act.

Response: Under INA§ 204(j), once an NIW applicant with an approved I-140 petition and a pending I-485 has completed the required five years of service, the physician may avail himself of the portability provisions of the portability provisions of INA § 204(j). Therefore, the bar on adjustment of status portability applies only before the service obligation is complete.

ADDENDUM I

K-3 Efficiency Issues

When Congress enacted the LIFE Act it stated that that the K-3 visa should be a "speedy mechanism for spouses and minor children of U.S. citizens to obtain their immigrant visas in the U.S. rather than wait for long periods of time outside the U.S."[16] AILA seeks to explore processing options that will give full effect to Congressional intent under the LIFE Act. Past experience indicates that a process permitting concurrent filing of I-129F/I-130 petitions, together with a policy encouraging the petitioner to determine whether the beneficiary will apply for a K-3 or immigrant visa at the U.S. consulate, will lead to the greatest efficiency in the K-3 program.

The statute requires the petitioner to file an immigrant visa petition on behalf of the foreign spouse, but it does not require issuance of a receipt notice prior to filing the K-3 petition with the Service. The statute provides that the foreign spouse must have:

> "concluded a valid marriage with a citizen of the United States who is the petitioner, is the beneficiary of a petition to accord a status under section 201(b)(2)(A)(i) that was filed under section 204 by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or
> `(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien"[17]

Petitioners should not have to wait for the I-130 receipt notice to file the I-129F. Neither the statute nor the regulations clearly require this sequential processing of petitions. The Service's regulations provide that to be classified as a K-3 spouse the alien spouse must be the beneficiary of an immigrant visa petition filed by a U.S. citizen on Form I-130, Petition for Alien Relative, and the beneficiary of an approved petition for K-3 nonimmigrant visa filed on Form I-129F. The I-129F form currently provides that petitioners must await a receipt for the I-130 petition prior to filing the I-129F petition.[18]

AILA understands that the Service has recently been accepting concurrently filed I-129F and I-130 petitions.[19] AILA supports this approach. However, our members report mixed experiences. Some members who have attempted concurrent filings have received rejection notices. In other cases, members reported that the Service administratively closed the I-129F where the Service adjudicated the I-130 filed by the same U.S. Citizen ahead of the I-129F. In then end, a petitioner who expected his or her spouse to receive a K-3 visa discovered that the sequential process led inevitably to an immigrant visa, which often takes more time than a K-3 visa to obtain at a U.S. Consulate abroad.

ADDENDUM II

I-130 Petitions Filed in Removal Proceedings

Effective February 19, 2008, USCIS' revised I-130 filing instructions, require the filing of stand-alone I-130 petitions with the Chicago Lockbox. The new instruction precludes filing of I-130 petitions for beneficiaries in removal proceedings at the Field Offices, which are ultimately responsible for interviewing and adjudicating the petition. Instead, the petitions must now be filed via the Chicago Lockbox, transferred to the geographically appropriate Service Center, and at some future point transferred again to the Field Office where the interview and adjudication will take place.

EOIR has become increasingly ambitious about case completion deadlines, and Immigration Judges are increasingly reluctant to grant multiple continuances to await adjudication of an I-130 petition. Some Immigration Judges deny continuances on the basis that the I-130 petition is pending, not approved. Furthermore, in certain instances, the I-

[16] 66 Fed Reg. 42590 (August 14, 2001).
[17] Pub. L 106-553, Section 1103(a).
[18] Form I-129F Form Instructions at p. 4 (07/30/07 edition).
[19] Q&A from AILA/SCOPS Liaison Minutes from the November 14, 2007, call:

"7. On our previous SCOPS call, it was mentioned that stand-alone I-130s would soon go through the Chicago lockbox. Once that occurs, where would an I-129F for a K-3 be filed, since the current guidelines state that it should be filed at the same Service Center as the pending I-130?

ANSWER: I-130s have been routed to the VSC or CSC for awhile. When the switch to the lockbox occurs, the lockbox will still route I-130s to either the CSC or VSC for adjudication. An I-129F would be filed accordingly. If you have a concurrent I-130/I-129F, USCIS does take these applications, a procedure not provided for in the regulations. USCIS will review the procedure once the move to the lockbox occurs. "

130 petition **must** be approved for motions based on adjustment of status.[20] AILA is concerned that the new system increases the risk that the I-130 petition will be delayed due to multiple transfers. Also, it does not address the problem that some I-130 petitions for beneficiaries in proceedings are placed in the normal adjudication queue at the Service Center, remaining there six months or more before an adjudications officer receives the file and reviews the contents of the Form I-130 (specifically Part C question 16 relating to whether the beneficiary has ever been under immigration proceedings), and notices that a District Office interview is required before adjudication.

AILA proposes that USCIS develop mechanisms to identify these applications early in the process, to ensure that I-130 petitions for beneficiaries in proceedings are consistently and promptly identified and forwarded to the Field Office. For example, such petitions could be identified by the Lockbox, and transferred directly to the Field Offices for adjudications, or placed in a separate processing track at the Service Centers.

ADDENDUM II

"Moonlighting" Under EADs

For many years there has been uncertainty concerning maintenance of status by H-1B and L-1 nonimmigrants with pending applications for adjustment of status who "moonlight" pursuant to an EAD. Some of the confusion in this area is due in part a legacy INS memorandum issued in 1997 in which the Service stated that "after receiving the EAD, the alien may work for any employer desired and is not subject to E, H, or L restrictions. *However, such an alien would lose his or her E-1, E-2, H-1B, or L-1 nonimmigrant status by working in open-market employment.*"[21]

AILA believes the language emphasized above merely signals that one would lose his underlying nonimmigrant status by changing employers, rather than by adding one. It is AILA's belief that an alien who adds an employer does not lose his underlying nonimmigrant status merely by working pursuant to an EAD, which is authorized employment under 8 C.F.R. § 274a.12(c)(9) and INA § 245(c)(8).

The 1997 legacy INS memorandum was issued before the rules were changed in 1999 to permit H-1B and L-1 nonimmigrants to be admitted to the United States pursuant to a nonimmigrant visa or advance parole, and to be employed either pursuant to an approved EAD, or a valid nonimmigrant petition approval.

In guidance issued by legacy INS after the 1999 rule change, the Service stated the following:

> However, an H-1 or L-1 nonimmigrant will violate his/her nonimmigrant status is s/he uses the EAD to *leave* the employer listed on the approved I-129 petition and *engage* in employment for a separate employer.[22] (Emphasis in original).

AILA believes that a nonimmigrant who "moonlights" pursuant to an EAD has not "left" his or her employer, and thus is still maintaining proper status. AILA requests USCIS to confirm that, in the case of an H-1B or L-1 nonimmigrant, present in the United States under a valid petition in either classification, who moonlights pursuant to an EAD, still maintains his H-1B or L-1 status.

ADDENDUM IV

Travel Without Advance Parole for E-1, E-2, E-3 and O-1 Nonimmigrants With Pending Applications for Adjustment of Status

On June 1, 1999, legacy INS issued a regulation which, among other things, relieved H and L nonimmigrants with pending applications for adjustment of status from the requirement of applying for advance parole before departing the United States.[23] In the supplementary information to regulation, the Service stated that, in addition to the H and L nonimmigrant classifications, it was considering an expansion of the dual intent concept to cover other long-term nonimmigrants. The Service specifically noted that while it had traditionally deemed an application for adjustment of status as evidence in determining whether an alien had abandoned nonimmigrant intent, INA § 214(b) "does not…require the Service to hold this position as an absolute rule." [24]

---

[20] See the EOIR Immigration Court Practice Manual released February 28, 2008, effective April 1, 2008, at: http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%205.pdf, pg 88).

[21] Memorandum from Paul W. Virtue, INS Acting Executive Associate Commissioner, Programs, HQ, 70/6.2.5, 70/6.2.9, 70/6.2612, 70/23.1, 120/17.2 (Aug. 5, 1997). (Emphasis added).

[22] Memorandum from Michael D. Cronin, Acting Associate Commissioner, Office of Programs, to INS field offices, HQADJ 70/2.8.12, 10.18, *AFM Update: Revision of March 14, 2000 Dual Intent Memorandum*, AD 00-03 (May 16, 2000).

[23] 64 Fed. Reg. 29,208 (June 1, 1999)

[24] *Id.* at 29,209

The Service added that it was interested in the public's view on the matter, and that it "would appreciate" written comments. AILA would like to re-engage USCIS on this issue and would request that the Service consider rethinking the advance parole requirement for E-1, E-2, E-3, and O-1 nonimmigrants.

E-1, E-2, & E-3 Nonimmigrant Visa Categories

AILA notes that the very basis of the E visa category results from treaties entered into between the United States and certain treaty countries, which the Department of State's Foreign Affairs Manual (FAM) states were negotiated to "enhance or facilitate economic and commercial interaction between the United States and the treaty country."[25] E-1 and E-2 visa holders by the nature of their employment are often required to travel frequently outside the United States. When an I-485 is filed for such a person, the result is often a request for expedited process of the accompanying Advance Parole application, which disrupts USCIS processing and requires significant USCIS resources to adjudicate.

E visa holders have never been subject to requirement of having a residence abroad which they have no intention of abandoning. In fact, the FAM specifically states:

> An applicant for an E visa need not establish intent to proceed to the United States for a specific temporary period of time; nor does an applicant for an E visa need to have a residence in a foreign country which the applicant does not intend to abandon. The alien may sell his or her residence and move all household effects to the U.S. The alien's expression of an unequivocal intent to return when the E status ends is normally sufficient, in the absence of specific indications of evidence that the alien's intent is to the contrary.[26]

In that same spirit, AILA requests the Service consider eliminating the advance parole requirement for E nonimmigrants. The rules are the same for E-3 nonimmigrants, where the standard for determining temporary entry is precisely the same as the standard applied to E-1s and E-2s. Likewise, an applicant for an E-3 visa is not required to maintain a residence in a foreign country.[27]

Withdrawing the advance parole requirement for nonimmigrants in E status comports with the nature and purpose of the E visa category. It would also be in the interest of facilitating international commerce and trade. Finally, it would significantly reduce the burden on USCIS of having to process advance parole applications for such individuals, including a significant number of expedite requests.

O-1 Nonimmigrant Visa Category

For similar reasons, AILA requests that USCIS eliminate the advance parole requirement for O-1 nonimmigrants seeking to adjust status. The INA does not require an applicant for an O-1 visa to have a residence abroad which he or she does not intend to abandon nor does it address the issue of the temporary stay of O-1 nonimmigrants. By definition, foreign nationals in O-1 status are extraordinary achievers at the top of their fields and therefore, tend to travel frequently to attend international conference and meetings. As in the case of E visa holders, the current rule only increases the number of Advance Parole expedite requests, which by their ad hoc nature disrupt Service processing and utilize significant Service resources.

Currently 8 CFR 245.2(a)(4)(C) reads as follows:

> (C) The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceeding and who is in lawful H-1 or L-1 status shall not be deemed an abandonment of the application if, upon returning to this country, the alien remains eligible for H or L status, is coming to resume employment with the same employer for whom he or she had previously been authorized to work as an H-1 or L-1 nonimmigrant, and, is in possession of a valid H or L visa (if required). The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceeding and who is in lawful H-4 or L-2 status shall not be deemed an abandonment of the application if the spouse or parent of such alien through whom the H-4 or L-2 status was obtained is maintaining H-1 or L-1 status and the alien remains otherwise eligible for H-4 or L-2 status, and, the alien is in possession of a valid H-4 or L-2 visa (if required). The travel outside of the United States by an applicant for adjustment of status, who is not under exclusion, deportation, or removal proceeding and who is in lawful K-3 or K-4 status shall not be deemed an abandonment of the application if, upon returning to this country, the alien is in possession of a valid K-3 or K-4 visa and remains eligible for K-3 or K-4 status.

[25] 9 FAM 41.51 N1(a)
[26] 9 FAM 41.51 N. 15.
[27] 9 FAM 41.51 N. 16-6.

AILA recommends the following regulatory change:

> (C) The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceeding and who is in lawful H-1, L-1, E-1, E-2, E-3 or O-1 status shall not be deemed an abandonment of the application if, upon returning to this country, the alien remains eligible for H, L, E or O status, is coming to resume employment with the same employer for whom he or she had previously been authorized to work as an H-1, L-1, E-1, E-2, E-3, O-1 nonimmigrant, and, is in possession of a valid H, L, E or O visa (if required). The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceeding and who is in lawful H-4, L-2, E-1, E-2, E-3 or O-3 status shall not be deemed an abandonment of the application if the spouse or parent of such alien through whom the H-4, L-2, E-1, E-2, E-3 or O-3 status was obtained is maintaining H-1, L-1, E-1, E-2, E-3 or O-3 status and the alien remains otherwise eligible for H-1, L-1, E-1, E-2, E-3 or O-3 status, and, the alien is in possession of a valid H-1, L-1, E-1, E-2, E-3 or O-3 visa (if required). The travel outside of the United States by an applicant for adjustment of status, who is not under exclusion, deportation, or removal proceeding and who is in lawful K-3 or K-4 status shall not be deemed an abandonment of the application if, upon returning to this country, the alien is in possession of a valid K-3 or K-4 visa and remains eligible for K-3 or K-4 status.

ADDENDUM V

Travel and Applications for Advance Parole

In 2004, USCIS Service Center Operations confirmed that an application for adjustment of status is not abandoned if the foreign national is otherwise authorized to depart and return either because the foreign national (a) already possesses a valid I-512L and returns before the 1-512L expires, or (b) has an 1-485 pending and is re-admitted as an H-1, H-4, L-1, L-2, K-3, K-4, V-2, or V-3, and he departs while his application for advance parole is pending.[28] The Q&A of the discussion reads as follows:

> **Advance Parole Pending - Travel During**. The new 1-131 instructions say: "If you travel before the advance parole document is issued, your application will be deemed abandoned if (1) you depart from the United States." We would like to confirm that abandonment of a pending advance parole application does not occur if the foreign national is otherwise authorized to depart and return either because the foreign national (a) already possesses a valid I-512L and returns before the 1-512L expires, or (b) has an 1-485 pending and is re-admitted as an H-1, H-4, L-1, L-2, K-3, K-4, V-2, or V-3.
>
> *USCIS: (a) If a foreign national (i) already possesses a valid, unexpired advance parole, (ii) applies for a new advance parole while he/she is present in the U.S., and (iii) then departs the U.S., the foreign national must return to the U.S. during the validity period of the current advance parole already in his or her possession. If the foreign national returns timely, abandonment of the pending advance parole application would not occur. However, the foreign national may not remain abroad after the initial advance parole expires and then seek to re-enter at a later time using the subsequent advance parole that was pending adjudication at the time the person departed the U.S.*
>
> *(b) Yes, we confirm that that abandonment of a pending advance parole application does not occur if the foreign national is otherwise authorized to depart and return because the foreign national has an 1-485 pending and is readmitted as an H-1, H-4, L-1, L-2, K-3, K-4, V-1, V-2, or V-3.*[29]

In both instances, the foreign national is authorized to depart the United States either because of his valid nonimmigrant status (which permits departure without advance parole) or his valid advance parole document. He needs no additional authorization to depart, and his adjustment of status application will not be abandoned because of the departure. Based on the foregoing AILA requests that USCIS confirm that an H-1, H-4, L-1, L-2, K-3, K-4, V-1, V-2, or V-3 nonimmigrant need not be present in the United States when he files for an advance parole document, and that in the case of someone whose current advance parole document is still valid when he files a new I-131 application, he, too, need not be present in the United States when that new application is filed.

The original purpose of requiring the applicant to be present in the United States when he filed the I-131 application and not leave until the parole was issued was to make certain that the permission to travel was applied for and

---

[28] Service Center Operations Teleconference of March 29, 2004, *available at* http://www.aila.org/infonet (document no. 04040761), question and answer 3.

[29] *Id.*

received before the travel. But since the applicants in our example already have permission to travel, the requirement to be in the United States when filing the application does not appear to be necessary.

ADDENDUM VI

Sunset of the EB-5 Immigrant Investor Regional Center Pilot Program

Introduction:

In 1992 Congress enacted an EB-5 immigrant investor regional center pilot program (pilot program).[30] The pilot program has been the bright spot in the EB-5 program. It is estimated that over 70% of all EB-5 immigrant investor petitions are filed through regional centers. EB-5 regional centers have attracted more than $200 million in foreign investments in the last two years. The EB-5 regional center pilot program has doubled in size between 2006 and 2007, and it is anticipated that it will double again from 2007 to 2008 to generate $1 billion in investment and 20,000 new jobs

Congress has extended the pilot program several times since its inception. The pilot program is currently set to expire again on September 30, 2008. Potential investors and regional centers have expressed concern about the pending sunset. Their concern is having an adverse effect on potential new projects that could create thousands of new jobs for U.S. workers and inject millions of dollars into the U.S. economy. While Congress is likely to extend the pilot program, it may not happen by September 30th.

AILA urges USCIS to promptly issue policy guidance setting forth how EB-5 I-526 and I-829 petitions, adjustment applications, and conditional residents will be treated after the sunset date if Congress fails to extend the pilot program by September 30th. Both legal precedent and economic considerations suggest that USCIS should continue adjudicating EB-5 cases after September 30th.

Precedent:

In the 1970s, immigrant visa numbers for the non-preference investor program became unavailable. Notice was provided in the DOS Visa Bulletin. I-526 petitions were filed, many with concurrent adjustment applications up until the day before visa numbers became unavailable. The I-526s were adjudicated.

In connection with adjustment applications filed by the non-preference investors, the BIA held in Matter of Huang, 16 I. & N. Dec. 362.1 (BIA 1978) (attached) that immigrant visa availability is established by the date of the adjustment filing, even if immigrant visa numbers subsequently become unavailable.

By analogy, even if the 3,000 EB-5 regional center visas set aside under Section 610 no longer become available on September 30th, USCIS should still not only continue to adjudicate regional center-based I-526 petitions pending after the sunset date, but also continue to adjudicate adjustment of status applications received before September 30th, as the 3,000 visas were available until September 30th.

Moreover, if visa numbers remain available in the general EB-5 category, USCIS should continue to adjudicate regional center-based I-526 petitions and adjustment applications received after September 30th under the general EB-5 immigrant visa cap, notwithstanding the pilot program sunset. Congress has allocated 9,940 immigrant visas annually to the EB-5 category. In FY 2006, USCIS reached a historical high of 749 investors admitted as lawful permanent residents.[31] The allocated 9,940 visas have never come close to being exhausted. Accordingly, ample immigrant visa numbers exist for the Service to adjudicate adjustment applications based on approved regional center-based I-526 petitions after September 30th.

Finally, there is ample authority for USCIS to continue processing regional center-based I-526 petitions after the sunset date. The concept of "immigrant visa unavailability" is understood to mean only a foreclosure of the ability to actually obtain an immigrant visa number**.** Even when an immigrant visa is unavailable or has retrogressed, petitioners may continue to file immigrant visa petitions, such as Form I-140, Immigrant Petitioner for Alien Worker and the Form I-130, Petition for Relative. By analogy, Form I-526, Immigrant Petition by Alien Entrepreneur should be able to be filed and adjudicated, even during the gap period between the sunset date and extension.

Reliance interests:

U.S. businesses, regional center administrators, and alien entrepreneurs have relied on the stability of the pilot program to plan for creating and expanding job-creating operations. Several regional centers release an EB-5

[30] Section 610(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (8 U.S.C. 1153 note).

[31] DHS Office of Statistics, Annual Flow Report (March 2007).

investor's funds from escrow upon the approval of an I-526 petition. Without I-526 adjudication, the cash committed and invested by the alien entrepreneurs will be stuck in limbo, unable to be released for job creation. Regional center administrators, including several formed in conjunction with state or local government agencies, are left without guidance as to whether new projects will be permitted to include EB-5 investments, and whether their committed investors will be able to gain any benefit in the foreseeable future. Congressional inaction has already had a chilling effect on the foreign investor pool. In a recessive economy, Congress will certainly extend the pilot program. If it fails to do so by September 30th, however, we hope that USCIS will show leadership in taking ameliorative steps to minimize the chilling and detrimental effects of the temporary sunset.

Questions:

1) What will happen to regional center-based I-526 petitions, adjustment of status applications, and I-829 petitions for regional center-based EB-5 investors that are pending on September 30th?
2) Can an adjustment of status application for EB-5 conditional residency be filed after September 30th if a regional center-based I-526 petition is approved before September 30th?
3) Please confirm that an EB-5 conditional resident who is the beneficiary of an approved regional center-based I-526 petition will not have his/her conditional resident status revoked, and will continue to accumulate time toward fulfilling the two-year conditional period, after September 30th. Similarly, please confirm that an approved regional center-based I-526 petition will remain a valid immigrant visa petition after September 30th.
4) What will happen to applications for regional center designation that are pending on September 30th?
5) If USCIS takes the view that EB-5 I-526 and adjustment petitions may not be filed after the sunset date, will USCIS consider the following ameliorative measures:
    a. Expedite all regional center I-526 petitions and adjustment applications?
    b. Permit concurrent I-526 petition and adjustment filings?
    c. Institute premium processing of regional center I-526 petitions?
    d. Allocate more staff to process regional center I-526 petitions and adjustment applications before September 30?

ADDENDUM VII

K-2 Adjustment of Status Issues

AILA's interpretation of the INA with respect to K-2 visa holders' eligibility to adjust status after reaching age 21 is further supported by a decision regarding a K-2 holder's eligibility to adjust status despite turning 21 prior to the adjudication of the application.[32] In *Verovkin* the court found that there is no statutory requirement that a K-2 dependent be under 21 years of age at the time of adjustment and that Congress did not intend to impose age restrictions on K-2 dependents' adjustment of status eligibility. Specifically, the court held that the date of determining a K-2 dependent's eligibility for adjustment is the date the K-2 visa is issued and, therefore, a K-2 visa holder does not age out provided he was issued the visa prior to turning 21. The court found that the USCIS' interpretation of the INA that a K-2 dependent had to adjust prior to reaching age 21 was unreasonable because it is,

> [A]t odds with the fact that a child can receive a K-2 visa up until the day of his or her twenty-first birthday. Following Defendant's interpretation of the age requirement a K-2 visa issued under these circumstances would be worthless the next day. Congress could not have intended such an absurd result.

Additionally, the Court analyzed a K-2 dependent's eligibility to adjust status in the context of the CSPA. While the CSPA does not apply to those adjusting from K-2 status, the court found the rationale behind the CSPA to be relevant, acknowledging that the CSPA was passed to remedy "the fundamental unfairness" of allowing a child's eligibility for immigration benefits to depend on USCIS controlled processing times. In referencing an earlier decision[33] the court noted that determining a K-2 dependent's age "by reference to the date on which he applied for adjustment of status rather than the date on which his application was adjudicated would result in fair treatment analogous to that provided by CSPA."

The court in *Verovkin* determined that the intent of Congress is to allow K-2 dependents to adjust status provided they obtain their K-2 visa prior to turning 21 years of age. Congress has demonstrated its intent both through the language of the INA and the principles of fairness underlying the CSPA. AILA believes that the *Verovkin* decision is

[32] *Verovkin v. Still,* 2007 U.S. Dist. LEXIS 93904 (N.D. Cal, December 2007); further citations to *Verovkin* omitted.
[33] *Jiang v. Still,* 2007 U.S. Dist. LEXIS 19205 (E.D. Cal., March 5, 2007)

persuasive authority. If USCIS were not to apply it nationwide it would produce an unjust result in which some K-2 visa holders could adjust status after reaching age 21 while others could not. Accordingly, we ask that the USCIS reconsider its interpretation of the eligibility of K-2 visa holders to adjust after reaching 21 years of age, and issue guidance in accordance with the decision in *Verovkin*.

ADDENDUM VIII

I-751 Petitions for CRs in divorce proceedings

Current practice at the USCIS Service Centers dictates that a conditional permanent resident who divorces during the pendency of the I-751 petition may withdraw the original I-751 petition and file a new I-751 petition with a waiver of the joint filing requirement.[34] This approach, however, often leaves the conditional permanent resident with a gap in resident status and employment authorization. It also initiates the accrual of unlawful presence for an individual who has attempted to comply with the law.

Prior to issuance of the 2003 Yates memo, many USCIS Field Offices permitted conditional permanent residents to present a new I-751 petition with a waiver of the joint filing requirement at the time of the I-751 interview. The current trend is for examiners to deny I-751 petitions that present this issue. This leads to a waste of resources, i.e. issuance of an NTA where the conditional permanent resident is placed in removal proceedings, at which time he or she may submit in immigration court a new I-751 petition with a waiver of the joint filing requirement. Furthermore, once the new I-751 petition and waiver of joint filing requirement is filed with the immigration court, ICE often moves to terminate proceedings and the I-751 petition is returned to, and ultimately adjudicated, by USCIS.

AILA requests that USCIS consider an administrative remedy which would protect the status of the conditional permanent resident until the I-751 petition is adjudicated. AILA recommends that USCIS permit an individual whose divorce is finalized during the pendency of the I-751 petition to file a new or amended I-751 petition with the appropriate Service Center, without having to withdraw the original petition. AILA also recommends that USCIS allow such individuals to present a new or amended I-751 petition at interview at USCIS Field Offices. Each of these approaches permits the conditional permanent resident to maintain his or her permanent resident status and employment authorization and prevents the accrual of unlawful presence until their waiver application is administratively adjudicated. Such a remedy not only protects a conditional permanent resident but also conserves government resources.

Accordingly, AILA respectfully requests that USCIS consider these points and issue updated guidance on the matter.

---

[34] See generally INA § 216 and the memorandum *Filing a Waiver of the Joint Filing Requirement Prior to Final Termination of the Marriage*, William R. Yates, Acting Associate Director, Operations, BCIS, HQADN 70/23.12 (Apr. 10, 2003). A conditional permanent resident who has commenced divorce proceedings cannot file individually to remove the conditions on residence by filing a waiver of the joint petitioning requirement. Rather, such an individual must file jointly with the U.S. citizen spouse or wait until the divorce is final. Since conditional permanent residents have a 90 day window in which to file to remove the conditions on residence, this presents an untenable situation as the divorce is often finalized during the pendency of the I-751 petition.