# Questions and Answers

March 19, 2009

## USCIS American Immigration Lawyers Association (AILA) Meeting, March 19, 2009

**Introduction**

Below are the questions posed by the American Immigration Lawyers Association and the USCIS answers discussed at the March 19, 2009 meeting held at USCIS headquarters.

## I. AILA Introduction

AILA appreciates the opportunity to continue to work closely with USCIS especially during this time of transition and renewal in Washington, DC. AILA is heartened by the recent directives issued by President Barack Obama and DHS Secretary Janet Napolitano relating to transparency in government and critical missions of the Department of Homeland Security (DHS).

Secretary Napolitano's directive, issued on January 30, 2009, sets a blueprint for future agency action that focuses on facilitating international travel and the naturalization of immigrants to our society while upholding the rule of law.[1] AILA is especially encouraged by Secretary Napolitano's remarks addressing legal immigration benefit backlogs and the treatment of widows and widowers of U.S. citizens. AILA is dedicated to working with the Secretary and DHS to address these and other critical issues.

AILA is also eager to meet President Obama's clarion call for increased government transparency and collaboration "across all levels of government with nonprofit organizations, businesses and individuals in the private sector."[2] AILA pledges to continue to work as a partner with DHS to provide our government with the benefits of our collective expertise and information.[3]

In addition to his call for increased government transparency President Obama's Memorandum addressing the administration of the Freedom of Information Act directs all agencies to "adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open government."[4]

In the spirit of this directive AILA urges USCIS to provide the public with the following documents and information in a complete and timely manner:

1. Memoranda and/or training materials guiding USCIS on the implementation of the H-1B Benefit Fraud & Compliance Assessment Report (September 2008) and the Government Accountability Office's (GAO) Immigration Benefits Vulnerabilities Study (December 2008);
2. Memoranda and/or training materials changing the standard used by USCIS Adjudicators to evaluate L-1A and L-1B petitions;

[1] Department of Homeland Security, Secretary Napolitano Issues Immigration and Border Security Action Directive, Office of the Press Secretary, January 30, 2009.

[2] Memorandum of January 21, 2009—Transparency and Open Government, 74 Fed. Reg. No. 15, 4681-4682 (January 26, 2009)

[3] Id.

[4] Memorandum of January 21, 2009—Freedom of Information Act, 74 Fed. Reg. No. 15, 4683-4684 (January 26, 2009)

3. Course syllabus and curriculum for USCIS' BASIC Training program;
4. Current SOPs for all petition and application types;
5. Scripts and training materials used for National Customer Service Center (NCSC) Representatives;
6. Internal Memorandum from USCIS General Counsel's Office regarding whether H-1B1 Singapore and Chilean Nonimmigrants are Counted under the H-1B Cap;
7. Explanation of the mathematical calculation used to determine statistical rate of approval and denial for counting of petitions for H-1B cap/lottery.

***Response:*** USCIS recognizes and shares in our administration's goal for transparency in the government. To that end, we publish certain policy memoranda and the Adjudicator's Field Manual on the USCIS public website. The additional materials AILA is seeking should be requested through the FOIA process, so that we can properly determine the merits of the request and assess whether there are any applicable exemptions from disclosure.

## II. Regulations/Guidance/Policy

### Transparency in Adjudications

USCIS appears to be reviewing the adjudication standards in a number of visa categories. Most notably, but not limited to, an evolution in the definition of specialized knowledge and the definition of "affiliated with" for H-1B cap exempt purposes. To date, however, no new policy guidance has been issued in these areas nor have changes to the adjudication standards been announced through the formal rule-making process. Transparency is critical to a credible and effective benefits adjudication policy. In the current environment, there is a general inability to determine what the requirements are for key visa categories leaving U.S. employers and applicants "in the dark." The lack of announced policy or guidance also leads to the unnecessary issuance of RFEs and NOIDs as applicants are unable to ascertain in advance USCIS evolving standards in these categories. The current situation leads to a waste of resources for both USCIS and the public and undermines President Obama's commitment to creating an "unprecedented level of openness in the government."[5] The following questions relate to USCIS' evolving adjudication standards in a number of areas and AILA's request that USCIS publicly share the changes being implemented either through the issuance of updated policy guidance and/or the formal rule-making process.

**1. The Weight of USCIS Policy Memoranda**

At the conclusion of our meeting on October 28, 2008, USCIS confirmed that the AAO (Administrative Appeals Office) is required to follow applicable law, regulations, binding decisions and agency policies. In addition, USCIS requested that AILA bring to its attention decisions issued by USCIS that are contrary to existing statutes, regulations, binding case law, precedent decisions or applicable policy guidance. Prior to our meeting AILA had submitted a number of examples on this issue. However, AILA members still report denials being issued that contravene current public Service policy in favor of non-binding correspondence and unpublished internal memoranda.

AILA requests an update on the progress being made by USCIS to address the disconnect between HQ's reaffirmation of Section 3.4 of the Adjudicator's Field Manual (AFM) and decisions continuing to being issued by the field that contradict this directive. AILA has attached to this agenda Service decisions highlighting this disconnect issued since our last meeting on October 28, 2008.

[5] Memorandum of January 21, 2009—Transparency and Open Government, 74 Fed. Reg. 4681 (January 26, 2009)

***Response:*** All Officers are required to follow the Adjudicator's Field Manual, which includes field guidance implementing applicable laws, regulations and agency policies.

**2. Continued Evolution of the Definition of Specialized Knowledge and Recent L-1B Denials Without the Benefit of Formal Rule-Making or the Issuance of Updated Policy Guidance**

As part of our October 28, 2008, meeting and discussion of USCIS' evolving definition of L-1B specialized knowledge, AILA brought a number of decisions to the attention of USIS HQ's that contradicted USCIS's long standing stated guidance on L-1B adjudications. To date, no formal rule-making or updated policy guidance has been issued to publicly announce a change in the standard of review for L-1A or L-1B petitions. AILA understands that USCIS has held recent training sessions to ensure a "more consistent approach" to the evaluation of L-1B applications and that USCIS has begun to pay extra attention to this issue.[6]

In the absence of formal rule-making and/or updated policy guidance that changes the standard for L-1A and L-1B adjudications AILA renews its request that USCIS send instruction to the field that prior legacy INS memoranda from James Puleo and Fujie Ohata ("Interpretation of Special Knowledge" CO-214L-P (James A. Puleo, Act. Exec. Assoc. Comm., Mar. 9, 1994) and "Interpretation of Specialized Knowledge" (INS Memorandum, Fujie O. Ohata, Assoc. Comm., Dec. 20, 2002)) on the proper standard for assessing "specialized knowledge" remain in effect and that Service Centers should not rely on unpublished decisions by the AAO that contradict USCIS's long standing guidance on this issue to deny L-1B petitions. AILA has attached a number of recent examples of Requests for Evidence (RFEs) and denials that contravene USCIS's publicly stated standard of review for L-1B petitions.

In addition, AILA requests a copy of the training materials and/or unpublished guidance used by USCIS in its recent training sessions on this issue.

Finally, AILA urges USCIS to define publicly what a "more consistent approach" entails, including a description of any plans for formal rule-making and/or updated policy guidance changing the standard of review for L-1 petitions.

***Response:*** As previously stated, the memoranda referenced in the question were issued by legacy INS prior to the enactment of the L-1 Visa Reform Act, which specifically referenced the problem of job shops and prohibited labor for hire. Nevertheless, the memoranda you refer to remain valid and serve as guidance to the agency. There have been a number of well written and well reasoned unpublished decisions regarding specialized knowledge, none of which, in our view, are inconsistent with the memoranda you have referenced, irrespective of whether they make specific mention of such memoranda. While these unpublished decisions do not constitute binding precedent, there is no prohibition against applying the same reasoning articulated in such unpublished decisions if a subsequent case fits the same fact pattern.

USCIS agrees that, in light of the above-noted legislative changes and the developing state of technology and business practices, it is worth reviewing whether updated policy guidance may be necessary to clarify the proper standard of review for L-1B petitions based on various factual scenarios. Although no formal decision has yet been made regarding whether new or supplemental policy guidance might be required, USCIS will continue to follow past policy guidance on L-1B issues until (and if) such time as the agency determines that formal rule-making and/or updated policy guidance might be issued that supersedes current guidance.

[6] BNA Privacy Law Watch, "DHS Plans Program Improvements for E-Verify, Visas, Updated Raid Policy", January 27, 2009.

USCIS cannot release any training materials or internal guidance that it may have on this topic, or any other, without having received an official FOIA request to determine the merits of the request and assess whether there are any applicable exemptions from disclosure.

**3. H-1B Denials Based on Unpublished AAO Decision and Definition of "Affiliated With" for H-1B Cap Purposes**

At the conclusion of our October 28, 2008, meeting, USCIS indicated that is was evaluating the definition of "affiliated with" for H-1B cap purposes and was considering issuing clarifying guidance to the field. To date, no such guidance has been issued, the absence of which has continued to foster uncertainty and confusion for those organizations relying on current Service guidance when filing non-cap-subject H-1B petitions under the "affiliated with" exception. In addition, AILA members continue to report inconsistent decisions being issued by the field that contravene current Service policy memoranda. The lack of consistency and transparency is especially problematic for those organizations who must decide to file as H-1B cap subject by April 1, 2009, or risk being unable to hire critically needed staff for the upcoming 2009/2010 school year.

AILA strongly urges USCIS to issue guidance to the field clarifying the "affiliated with" standard as articulated by Michael Aytes in the June 6, 2006, memorandum.[7] Moreover, AILA urges that guidance to clarify that where the cap-exemption is because the employer is the "qualifying" entity, all H-1B employees of the qualifying employer are cap-exempt, and that only where the employer claims cap-exemption because the H-1B alien will be "employed at" a location that itself qualifies for cap-exemption does the petitioner have the obligation to show that the H-1B alien will be employed in an activity that furthers the educational or research mission of the institution or location at which the H-1B alien's services are to be performed.

***Response:*** USCIS is currently evaluating this process and anticipates issuing guidance with regards to affiliation.

**4. Successor in Interest Denials**

At the conclusion of our October 28, 2008, meeting, USCIS indicated that it was under the process of reviewing its policies relating to the "successor in interest" standard and was considering issuing clarifying guidance to the field in the very near future. In addition, USCIS indicated that it was continuing to hold denials based solely on the successor in interest issue. Finally, USCIS indicated that the held cases would be reviewed based on the forthcoming guidance.

To date, no new guidance has been issued by USCIS on this issue. AILA requests that USCIS provide an update and timeframe when USCIS expects to issue the clarifying guidance on the "successor in interest" standard. AILA urges USCIS to issue the clarifying guidance as soon as possible to alleviate the public's uncertainty on this issue as well as bringing the cases currently being held to final adjudication.

***Response:*** We hope to release guidance on this issue within the next month or so.

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[7] Memorandum by Michael Aytes, Associate Director, Domestic Operations, *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on § 103 of the American Competitiveness in the Twenty-First Century Act of 2000(AC21)(Public Law 106-313, Revisions to Adjudicators Field Manual (AFM) Chapter 31.3 (AFM Update ADO6-27)*, HQPRD 70/23, AD06-27 (June 6, 2006)(Aytes Memorandum).

**5. I-9 Handbook: Asylees and Refugees**

During our October 28, 2008, meeting we discussed the hardship to asylees and refugees who are required to present an EAD as evidence of continued work authorization after an initial 90-day period, although they are deemed to have unlimited work authorization incident to status as provided at 8 CFR § 274a.12 (a)(3), and discussed in two memoranda issued by USCIS.[8] USCIS indicated in our meeting that although refugees and asylees are work-authorized incident to status, the requirement that they present an EAD for I-9 purposes is not inconsistent with the relevant regulation and memoranda related to this issue. USCIS argues that there is a distinction between work authorization and evidence of work authorization for I-9 purposes.

AILA is cognizant of USCIS' desire to combat identity theft and document fraud by further reducing the number of acceptable identity documents workers may present to employers to verify employment eligibility. AILA is also concerned with eradicating identity theft and fighting document fraud, but urges USCIS to reverse its position requiring asylees and refugees to produce EADs within 90 days. By requiring asylees and refugees to obtain EADs within 90 days USCIS is creating a different standard for this protected class of individuals. Employers are now put in the possibly actionable position of requiring asylees and refugees to produce specific documents to comply with the I-9 requirements. If USCIS will not change its position on this issue, AILA urges USCIS to provide a longer period of time for asylees and refugees to comply in light of continued Service delays in consistently issuing EADs within 90 days. AILA would also urge USCIS to eliminate the fee requirement for EADs for asylees and refugees for extensions and replacements of EADs.

***Response:*** As noted in our previous meeting, asylees and refugees are not required to present an EAD for Form I-9 purposes. They also may present acceptable List B and C documents, such as a driver's license and unrestricted Social Security card. Refugees and asylees are entitled to apply for their first EAD free of charge. The EAD is valid for two years, enough time for refugees and asylees to acquire acceptable List B and C documents in the event they do not adjust to Lawful Permanent Residence prior to the expiration of their EAD. However, it is important to note that applying for an EAD is an option and not a requirement.

**6. I-751 Processing and Adjudication**

**a. I-751 Petitions for Conditional Residents in Divorce Proceedings**

AILA has discussed with USCIS HQ in a number of prior meetings the hardship caused to applicants who are separated but not yet divorced during the I-751 petition process. AILA has advocated for an administrative remedy that would 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. In addition, AILA has recommended that USCIS allow such individuals to present a new or amended I-751 petition at interview at USCIS Field Offices. USCIS has previously indicated it would review our recommendations on this issue and issue updated guidance.[9] AILA respectfully requests an update on whether any progress has been made on this issue and whether updated guidance may be forthcoming in the near future.

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[8] See Memorandum by William Yates, Acting Associate Director, Operations, *The Meaning of 8 CFR 274a.12(a) as it Relates to Refugee and Asylee Authorization for Employment*, HQADJ 70/21.1.13 (March 10, 2003) ("Yates Memorandum") and Memorandum by Dea Carpenter, Deputy General Counsel, *Employment Authorization of Aliens Granted Asylum*, HQCOU 90/15 (June 17, 2002) ("Carpenter Memorandum)

[9] See September 25, 2007, and April 2, 2008 AILA-USCIS HQ Meeting Minutes

***Response:*** USCIS guidance on this subject is currently in the concurrence process with the expectation that it will be issued by or before summer 2009.

**b. Holding I-751 Petitions in Abeyance For Those Applicants Temporarily Living Abroad**

AILA understands that USCIS holds in abeyance the I-751 petitions filed by those applicants that are currently living abroad and will not schedule the beneficiary for biometrics or complete adjudication of the petition until the beneficiary and petitioner demonstrate intent to return permanently to the United States. This policy appears to impose a physical presence requirement for I-751 beneficiaries and petitioners that is not supported by the statute or regulations. 8 CFR § 216.4(a)(4) only requires that the applicants return to the United States to comply with the interview requirements contained in the Act.[10] In practice most I-751 applicants are not scheduled for interview and are instead approved by the Service Center after a review of the documentation submitted in the I-751 filing.[11] It appears the mere inclusion of a foreign address on the I-751 petition triggers USCIS to hold the case in abeyance until the applicants have communicated an intention to return to the US in some unspecified manner.

AILA urges USCIS to reverse this policy and permit beneficiaries to be scheduled for biometrics and bring the I-751 petitions to final adjudication notwithstanding the temporary residence of an applicant abroad. In such cases USCIS might consider requiring a mandatory interview requirement to confirm the continued bona fide nature of the marriage and ascertain the applicant's intention to return to the U.S. after the completion of the temporary stay abroad. By subjecting these applicants to an across-the-board hold, USCIS is imposing a physical presence requirement not supported by the statute and current regulations and causing unnecessary delay in the adjudication of these I-751 petitions.

***Response:*** The "overseas hold" practice does *not* impose a "physical presence" requirement on I-751 applicants. Rather, it simply reflects the reality that evidence that is vital to the proper adjudication of a Form I-751 (biometrics) cannot routinely and feasibly be obtained while the alien is abroad. In addition, USCIS implemented policy guidance to instruct the Service Centers to continue processing petitions where the CPR is temporarily overseas on government/military orders with an APO/FPO mailing address on the form; the Service Centers will place all petitions where the CPR is temporarily overseas but not on government/military orders or, the CPR is on government/military orders but does not provide an APO/FPO mailing address, on an 'overseas hold.'

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[10] 8 CFR §216.4(a)(4) Physical presence at time of filing . A petition may be filed regardless of whether the alien is physically present in the United States. However, if the alien is outside the United States at the time of filing, he or she must return to the United States, with his or her spouse and dependent children, to comply with the interview requirements contained in the Act. Furthermore, if the documentation submitted in support of the petition includes affidavits of third parties having knowledge of the bona fides of the marital relationship, the petitioner must arrange for the affiants to be present at the interview, at no expense to the government. Once the petition has been properly filed, the alien may travel outside the United States and return if in possession of documentation as set forth in § 211.1(b)(1) of this chapter, provided the alien and the petitioning spouse comply with the interview requirements described in § 216.4(b) . An alien who is not physically present in the United States during the filing period but subsequently applies for admission to the United States shall be processed in accordance with § 235.11 of this chapter.

[11] 8 CFR §216.4(b) Interview -- (1) Authority to waive interview . The director of the regional service center shall review the Form I - 751 filed by the alien and the alien's spouse to determine whether to waive the interview required by the Act. If satisfied that the marriage was not for the purpose of evading the immigration laws, the regional service center director may waive the interview and approve the petition. If not so satisfied, then the regional service center director shall forward the petition to the district director having jurisdiction over the place of t he alien's residence so that an interview of both the alien and the alien's spouse may be conducted. The director must either waive the requirement for an interview and adjudicate the petition or arrange for an interview within 90 days of the date on which the petition was properly filed.

Petitions that indicate that the CPR is temporarily overseas, but not on government/military orders, are reviewed for information concerning the reason they are overseas and when they intend to return to the U.S. I-751 petitions require ten-print fingerprints as well as biometrics and identity verification. Once the biometric requirement is met, an officer will review the application for eligibility. If the CPR is deemed eligible for removal of conditions, an I-551 card will be issued; all I-551 cards must be mailed to a U.S. address provided by the CPR. If the CPR does not comply with the biometric requirement, the petition will be denied in accordance with 8 CFR §103.2(b)(13)(ii).

**c. Permitting I-751 Beneficiaries to Have Biometrics Taken Abroad**

As discussed above, AILA understands that USCIS will not schedule an I-751 beneficiary for biometrics while living abroad. AILA respectfully requests that USCIS permit those I-751 beneficiaries living abroad to have biometrics taken overseas or otherwise comply with the fingerprint and photograph requirements for I-751 petitions. Currently, USCIS only allows those who reside overseas pursuant to military or government orders, including conditional permanent resident dependents residing overseas to submit two passport style photos for applicants and dependents and two completed fingerprint cards (Form FD-258) for applicants and dependents between the ages of 14 and 79. The current instructions to Form I-751, specify that the fingerprint cards must be prepared by a U.S. Embassy or U.S. Consulate, USCIS Office or U.S. Military installation.

AILA requests that USCIS review the feasibility of expanding the ability of biometrics to be taken abroad for all I-751 beneficiaries other than those living abroad pursuant to military or government orders. AILA believes this expansion will have a significant beneficial impact on those I-751 beneficiaries living abroad while creating an inconsequential burden on USCIS operations.

***Response:*** Identity verification, which is completed at the time of biometrics processing at an ASC office, is essential in processing applications and petitions. At this time, USCIS is not in a position to expand biometrics processing and identity verification overseas for all I-751 applicants who are temporarily residing abroad. An exception was made for those applicants on government/military orders to facilitate processing for service members' families residing abroad; however, sufficient resources are not currently available for the requested expansion since the processing of FD-258 fingerprint cards is quite extensive.

## III. Specific Processing/Procedural Issues

**7. Re-adjudication of Established Facts**

AILA members continue to report the denial of nonimmigrant extension petitions based upon a determination that the prior petition was approved in error. In our October 28, 2008, meeting AILA requested that USCIS instruct adjudicators on the April 2004, Yates Memorandum which discussed the significance of prior USCIS approval of a nonimmigrant petition in the context of eligibility for an extension.[12] Specifically, AILA asked USCIS to direct adjudicators to approve subsequently-filed petitions where there is no material change in the underlying facts absent material error in the prior adjudication, fraud in obtaining the prior adjudication, or a material

[12] Memorandum by William R. Yates, Associate Director of Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (April 23, 2004)("Yates Memorandum"

change in circumstance that has a bearing on eligibility for a category, and to remind adjudicators that a "material error" must be more than the substitution of the opinion of one examiner for another.

In the officially published minutes of our meeting, USCIS indicated that it "makes every effort to credit its prior determination when considering an extension." USCIS indicated that the "2004 Yates memorandum provides examples of cases where a prior approval of the petition does not bind the agency in adjudicating a subsequent request, including where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility." In addition, USCIS indicated that it "instructs its adjudicators to articulate clearly the basis for denying a request for benefits, and, where appropriate, to request further evidence to provide the applicant or petitioner with an opportunity to meet its burden of establishing eligibility for the benefit sought." Finally, USCIS stated that "adjudicators are further encouraged to explain in their Request for Evidence or denials why they have determined that the earlier adjudication was due to material error, or that there exist changed circumstances or new information available supporting the denial of the new request."

AILA members, however, continue to report RFEs and denials for extension of status petitions where adjudicators do not articulate the reason for the re-adjudication of established facts, nor do they indicate that there was a material error with regard to the previous petition approval, nor a substantial change in circumstances, nor new material information that adversely impacts the petitioner's or beneficiary's eligibility. Please find attached to this agenda a number of recent examples addressing this issue.

AILA renews it request that adjudicators be instructed to follow the tenets of the 2004 Yates memorandum and clearly state the reasons for challenging the validity of the initially approved petition including articulating the standard for "material error" and "substantial change."

***Response:*** Adjudicators will be reminded to include a clear explanation of any finding that there has been a substantial change or material error in the RFEs and denials.

**8. Denials without Requests for Evidence (RFE) or Notices of Intent to Deny (NOID) and Improper Implementation of the 2007 Neufeld Memorandum**

AILA members continue to report the denial of petitions and applications without the issuance of an RFE or NOID that contravene the principles of the June 2007 Neufeld[13] and the 2005 Yates[14] memoranda and the standard articulated in the official public minutes from our October 28, 2008 meeting relating to this issue. Please find attached to this agenda a number of examples that contravene USCIS's current policy. AILA renews its request that a reminder be issued to the field on this issue.

***Response:*** As noted at the October 28, 2008 meeting, USCIS remains committed to providing customer-oriented service and judiciously exercising its authority to outright deny applications or petitions. Certain instructions in the cited 2005 Yates memorandum are not pertinent given recent regulatory changes. For reasons outlined in great detail in the new RFE rule, USCIS expects the

[13] Memorandum by Donald Neufeld, Acting Associate Director, Domestic Operations, *Removal of the Standardized Request for Evidence Processing Timeframe*, HQ 70/11, 70/12, AFM Update AD07-05 (June 1, 2007) (Neufeld RFE Memorandum)

[14] Memorandum by William R. Yates, Associate Director, Operations, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID),* HQOPRD 70/2 (February 16, 2005) (Yates RFE Memorandum) and see Michael Aytes, Associate Director, Domestic Operations, *Case Management Timelines*, (October 27, 2006), Footnote 7, http://www.uscis.gov/files/pressrelease/casemgmt.pdf

public to provide complete information in each Form and to include all required documentation with each filing. If the case is clearly ineligible, USCIS will not delay adjudication by issuing an RFE. However, if the case is not clear, then USCIS will request further information from the applicant or petitioner. Upon review of the record, if the USCIS adjudicator determines that the applicant or petitioner has not met his or her burden to establish eligibility for the benefit, the case may be denied.

**9. Educational Credentials Evaluations**

**a. Database of USCIS Decisions on Degree Evaluations**

Under legacy INS there once available in the Immigrant Inspector's Handbook an Appendix entitled "Department of Health Education and Welfare Foreign Education Evaluations."15 The Appendix provided a compilation of evaluations and assessment to U.S. equivalency of a number of foreign degrees. USCIS relies heavily on the AACRAO Electronic Database for Global Education (EDGE)[16] to confirm the evaluation of foreign educational credentials submitted with relevant applications and petitions (e.g most notably H-1B and I-140 petitions.) However, this database is not freely available to general public, but instead is a for-profit database available only to subscribers.

AILA urges USCIS to increase the transparency of the education evaluation process and make public in an updated compilation the results of its findings as to the equivalency of particular foreign degrees.

***Response:*** Please see below for both (a) and (b)

**b. Reliance on the AACRAO EDGE Database**

In a recent unpublished AAO decisions which address the equivalency of certain foreign medical degrees to the U.S. Doctor of Medicine (MD) degree, the AAO indicated that, though petitioners had submitted credentials evaluations from commercial educational credentials evaluation services, it had reviewed the AACRAO EDGE database in making its determination, by implication dismissing the evaluations of the commercial evaluation services as "personal opinions."[17] AILA is concerned about USCIS's undue reliance on one private, for profit database that is not available to the general public. While private education evaluations have long been used by applicants and USCIS to corroborate education equivalencies, it now appears as though USCIS is exclusively relying on the EDGE database and discounting the use of other educational credential resources.

AILA believes this undue reliance on the EDGE database is in conflict with the Adjudicator's Field Manual guidance on the weight to be afforded credentials evaluation reports. The AFM says the following:

> (C) Credentials Evaluation: In cases involving foreign degrees, you may favorably consider a credentials evaluation performed by a certified independent credentials evaluator who has provided a credible, logical and well-documented case for such an equivalency determination that is based solely on the foreign degree(s). In addition, you may accept an evaluation performed by a school official that has the authority to make such determinations and is acting in his or

[15] Please see attached to this agenda a copy of Appendix 5-F, Immigrant Inspector's Handbook
[16] American Association of Collegiate Registrars and Admissions Officers (AACRAO)
[17] *See,* e.g., SRC 08 118 51124 (AAO, Jan. 9, 2009) at page 5; SRC 08 219 53365 (AAO, Jan. 29, 2009) at page 5,

her official capacity with the educational institution. Nevertheless, it is important to understand that any educational equivalency evaluation performed by a credentials evaluator or school official is solely advisory in nature and that final determination continues to rest with the adjudicator.[18]

Additionally, there is a November 13, 1995, legacy INS memorandum sent from the Office of Examinations to all Service Center directors concerning the use of credential evaluations. The 1995 memorandum reminded adjudicators that "credential evaluations submitted with an H-1B petition by a reputable credentials evaluation service should be accepted without question unless containing obvious errors."[19] The memorandum further states that "the ability of the credentials evaluator to perform the evaluation should not be challenged if the evaluation was performed by a professional credentials evaluations service."[20] USCIS has not repudiated this memorandum, or issued updated guidance that indicates that the EDGE database is the sole source to be used for credentials evaluations.

AILA requests that USCIS remind adjudicators that the EDGE database is not the sole acceptable source of academic equivalency information, and for examiners to provide applicants with the opportunity to refute and/or bolster any claims from USCIS that a credential evaluations service does not meet the EDGE database standard of review.

***Response:*** USCIS considers all sources, including EDGE and AACRAO databases, and has received many evaluations where the evaluators list membership in AACRAO in their credentials and list AACRAO publications as their reference materials. USCIS adjudicators review all evidence in the record and make determinations based on the individual facts of each case. The AAO's decisions are available to the public and provide an extensive compilation of the results of its findings as to the equivalency of particular foreign degrees.

### 10. Re-Engineering the H-1B Cap-filing and Receipting Process

AILA understands that USCIS anticipates going through the formal rule-making processing in the spring or early summer in 2009 to adjust the H-1B "lottery" filing system in advance of the 2010 fiscal year filing period to create a pre-registration system that would streamline the process and reduce the paperwork required for participating in the "lottery." AILA requests any information USCIS is able to share about the proposed rule-making at this time. AILA would be pleased to continue to participate in any focus groups and pre-planning for the proposed pre-registration process and assist USCIS in this undertaking.

***Response*:** USCIS appreciates AILA's offer to participate in focus groups. However, USCIS cannot comment on potential rulemaking.

## IV. General Processing/Procedural Issues

### 11. "Boilerplate" and "Broad Brush" Requests for Evidence

AILA members continue to report the issuance of "boilerplate" and "broad brush" RFEs since our last meeting. At the conclusion of our October 28, 2008, meeting USCIS reaffirmed its policy to encourage "its adjudicators….to prepare RFEs that will articulate the deficiencies in the request for benefit as a matter of administrative efficiency, thereby reducing burdens on both the agency

[18] AFM 22.2 (j)(1)(C).
[19] INS Instructs on Supporting Documentation For H-1B Petitions, March 25, 1996, 73 No. 12 Interpreter Releases 364.
[20] Id.

and the petitioner/applicant." USCIS further stated that "adjudicators are aware that it is neither in the interests of the agency nor those of the regulated public to issue "boilerplate" RFEs that do not address the specific deficiencies in a request for benefits, and are trained to tailor their RFEs accordingly." Prior to our meeting AILA had provided USCIS with a number of examples of this issue. Please find attached more recent examples of "boilerplate" and "broad brush" RFEs that have been issued by the field.

AILA renews its request that guidance and training be given to the field to address this ongoing problem.

***Response:*** USCIS service center management staff and Quality Unit personnel review the casework on an on-going basis and make course corrections where needed. In addition, Service Center Operations is currently including RFEs in their Quality Assurance Review.

Our program experience indicates that some petitioners do not provide required initial evidence or sufficiently detailed supporting documents with the initial filing resulting in the need for an RFE to establish the legal benefits sought. USCIS evidentiary requests are general in nature to allow the petitioner leeway to determine which documents they possess that will satisfy the evidentiary requirements. The burden is on the petitioner to establish eligibility and we will continue to review any and all evidence submitted.

**12. Preponderance of the Evidence**

During our October 28, 2008, meeting, AILA urged USCIS HQ to remind examiners that the proper standard of evidence for most applications is the "preponderance of the evidence" standard and to reinforce prior guidance on this issue. USCIS indicated at the conclusion of our meeting that higher standards of proof may apply in certain instances based on the specific benefit or relief sought and assured AILA that adjudicators receive training on the appropriate burden of proof standards during their USCIS Academy training. USCIS further indicated that if individuals receive a decision or Notice of Intent to Deny or Revoke that erroneously includes phrases such as "clearly establish' or other language alluding to a standard other than "preponderance of the evidence," the most appropriate response is to respond to the RFE, submitting the requested evidence, and note that the adjudicator appears to have referenced the incorrect standard of proof in the notice.

While AILA appreciates USCIS proposed solution to this issue, members are still frequently reporting that adjudicators are applying the incorrect standard of proof in RFEs and in denials. AILA requests that USCIS review its training materials on this issue and redouble its efforts to make sure adjudicators are well trained and receive ongoing guidance on the correct standards of proof. It is a waste of USCIS and the public's resources to issue RFEs and denials that articulate the incorrect standard of proof. Please find attached to this agenda recent examples of RFEs and denials that articulate incorrect standards of proof.

***Response*:** Thank you for providing us with examples of RFEs and denials that you believe articulate the incorrect standard of proof. As is the case with the other materials you have submitted with the March 19, 2009 Agenda, we will review the corresponding records of proceeding in the specific cases to determine whether any error regarding standard of proof has in fact occurred, and, if so, will take appropriate corrective action. You may rest assured that USCIS continuously strives to issue the highest quality decisions in as timely a fashion as feasible, and our adjudicators' overall track record reflects this demanding standard. We believe

our adjudicators' training – and the work of our USCIS Academy - is second to none. That said, we recognize that, given the heavy caseload of our adjudicators, there may be instances when the wording of a particular decision or RFE may not have articulated the appropriate standard of proof for the type of request in question, thereby resulting in some additional expenditure of resources and delays which might otherwise have been avoided.

Our Service Centers are aware of the appropriate standards of proof for the variety of matters they are charged with adjudicating, and have made it a priority to conduct training, as needed, to ensure that their decisions reflect the correct standard of proof, based on the particular type of request for benefits being made. USCIS is currently reviewing this issue globally with a special emphasis on quality assurance, and, if more formal training and guidance is deemed necessary, the agency will take appropriate measures to minimize any such errors in the future. Please continue to bring individual cases to our attention.

**13. Integrity of USCIS Processing Time Reports**

AILA understands that the processing time reports listed on USCIS' website are targeted timeframes that do not necessarily reflect real-time data. In addition, we understand that while the Service Centers may send processing time reports to USCIS HQ on a monthly basis many times this information is not updated monthly and that HQ has indicated that it will only list dates for product lines that are outside processing time goals.

AILA urges USCIS to revamp the processing time reports and report both real-time data provided by field, and to include separately the targeted timeframes in order to provide the public with information on progress USCIS toward its goals for backlog reduction. It is crucial that USCIS provide real-time data so that customers can accurately judge current processing times. Revamping the processing times report to include real time data will increase government transparency and promote accountability.

***Response:*** USCIS is currently providing customers with two processing time reports that are updated on a monthly basis. These include: 1) a report providing current case specific processing time information for each Field Office and Service Center, and 2) a report providing form specific information on USCIS' average national processing times; processing time goals for FY09; target active pending levels at the end of FY08; and the current case backlog as calculated against the end of FY09 goals. Both of these reports are using the most current field office and Service Center production data available. With regard to the concern expressed over the use of the Service Center monthly processing time reports, USCIS Domestic Operations, Operations Planning Division does review these reports on a monthly basis to ensure processing times calculated are consistent with what the Service Centers have reported. AILA is correct that USCIS processing times posted on the web for each field office and Service Center only displays the FY09 processing time goal when an office or center is completing cases within the prescribed goal period (ex., 4-months, 6-months). Only when an office or center is lagging in their production and not meeting the performance goal does USCIS display an actual date (ex., April 8, 2008). This treatment of the processing time information is viewed as most appropriate for identifying those offices that are meeting the performance goal and those that are not. Moreover, it is believed that the information presented does allow the customer to accurately judge where their specific case stands within the USCIS processing queue.

In fiscal year (FY) 2008 USCIS acknowledged that the posting of field office and Service Center processing times on the web was confusing and somewhat misleading due to the lack of clarity concerning the date the processing time information was being posted to the web, and the "as of" date that the processing times reflected. Additionally, it was identified that the general introductory narrative statements accompanying the field office and Service Center processing time data was not as clear as intended. Consequently, on September 28, 2008 USCIS updated its processing time web page to more fully describe its current operating environment as well as to provide customers with very specific instructions on how to use and interpret the processing time information posted. USCIS will evaluate the feasibility of adding the processing goals for each of the form types listed on the field office and Service Center processing time reports, however, this information is already available and updated each month via the *USCIS Processing Times - Progress Toward FY 2009 Goals report* (described above as report number two. Additionally, this report may be found on the USCIS web at http://www.uscis.gov under the Services & Benefits tab).

**14. Update on Immigration Benefit Backlogs**

Secretary Napolitano's action directive issued on January 30, 2009, specifically requests an update on the progress being made to reduce the significant backlogs that have developed in the adjudication of naturalization petitions and adjustment of status applications.[21] Specifically, Secretary Napolitano requested the following information:

a. "Which regional offices still lag behind in making progress toward target processing times, and what specific steps are recommended for providing priority resources to those offices?
b. Provide an assessment of information-sharing with the Department of State's Bureau of Consular Affairs on projected adjustment caseloads, to be used by that Bureau in setting each month's cutoff dates on waiting lists for immigration categories that are limited by a yearly quota,
c. What steps have been taken and what further steps are recommended to make sure that the full quota of permanent immigration spaces is used each fiscal year?
d. What regulatory or legislative changes (including a possible pre-application filing procedure for adjustment cases) are recommended to facilitate caseload planning and make optimum use of USCIS' adjudication capacity?"

AILA is pleased to continue to partner with USCIS to address many of the issues highlighted in Secretary Napolitano's action directive including making recommendations to assist USCIS in continued backlog reduction. In addition, AILA requests that USCIS provide an update on progress it has made and to discuss any immediate plans it has related to backlog reduction efforts as detailed in Secretary Napolitano's action directive.

***Response:*** In response to the filing surge in FY07, USCIS developed a two year Surge Response Plan to proactively address the increase in workload and to ensure the timely processing of applications. Based on the pending application and petition levels at the end of FY07 and the projected new receipts for FY08 and FY09, the Surge Response Plan provided a blueprint for achieving USCIS published processing time improvements by no later than the end of the 2nd quarter of 2010. Through aggressive hiring and training, details, and the expanded use of overtime, USCIS exceeded FY08 goals and is now on track to achieve its processing time commitments by the end of FY09.

[21] Department of Homeland Security, Secretary Napolitano Issues Immigration and Border Security Action Directive, Office of the Press Secretary, January 30, 2009.

USCIS found it necessary to alter its hiring and training goals at the start of FY09 to adjust to receipt and revenue levels that were below original forecasted levels for FY08. These adjustments resulted in the elimination of hundreds of vacant temporary surge positions and a modification of all field office production goals that reflected the progress achieved during FY08. Some field offices and service centers were less affected by the application surge and are expected to achieve their production goals sooner than others. This will leave some offices in the position of having excess capacity because of the higher staffing allocation provided under the Surge plan. In order to leverage all available resources and help ensure that those offices that have not yet achieved their production goals are successful, USCIS is moving some applications that do not require an interview to those offices identified as having excess capacity. USCIS continues to post local office processing times on the USCIS public website.

**15. USCIS Coordination with ICE at the Time of Adjustment Interviews for those with Outstanding Orders of Removal**

AILA renews its request that USCIS coordinate with ICE to end the common practice of arrest of those applicants with outstanding orders of removal who appear for interviews in conjunction with benefit applications. There are many instances of persons with removal orders—sometimes old removal orders—becoming eligible to adjust status through a visa petition. Many cases are quite compelling, involving a long residence in the United States, American citizen spouses, children, parents, etc. However, when a visa petition is filed, the beneficiary/respondent is often exposing himself to arrest, detention, and deportation. AILA members throughout the US report of the routine arrest of applicants with outstanding orders of removal after a cursory review of their applications at the time of interview. In many instances applicants are handed INA § 245 denial notices as soon as they are called into their interviews, without an opportunity to have the merits of their underlying petitions assessed. AILA urges USCIS to coordinate with ICE to permit those applicants who have established prima facie eligibility for the classification and benefit have their underlying petitions and applications fully and fairly adjudicated without the fear of automatic arrest and deportation. AILA has also made this request to ICE and would be pleased to offer further assistance in facilitating the coordination between the two departments.

***Response:*** USCIS will continue to work with ICE on the most effective means possible of arresting aliens with outstanding orders of removal. However, AILA members should be working with ICE to resolve any outstanding orders of removal for alien clients intending to pursue immigration benefits through USCIS.

## V. Updates

**16. Leadership and Staffing Updates**

AILA understands that DHS and USCIS are undergoing a significant amount of change in light of President Obama's taking office on January 20, 2009. AILA respectfully requests that USCIS share any updates on changes in leadership and staffing that have recently occurred, or are expected to occur in the near future.

***Response:*** Verbal at Meeting

**17. Update on USCIS' Transformation Program**

USCIS has frequently discussed with AILA and other stakeholders the progress made towards the implementation of the Transformation Program including details of many of the aspects of the Concept of Operations report issued in March 2007. At the end of 2008, USCIS publicly announced that a contract had been awarded to a vendor to begin to develop the necessary technology for the program. AILA respectfully requests an update regarding further progress of the transformation program. In particular, AILA requests an update on the movement towards pure electronic filing and a timeframe on the development of a system that will permit electronic transmission of fees, such as a system for payment by credit card.

***Response:*** The Office of Transformation Coordination (OTC) was created in November 2008, to coordinate transformation initiatives across the agency and with other DHS components and federal agencies. OTC has assumed responsibility for the Transformation Program Office, which administers Transformation's existing pilots and a Solutions Architect Task Order that was awarded to IBM on November 3, 2008.

The Solutions Architect Task Order, which was temporarily delayed due to an award protest, is now in its base period. The work performed during this period is critical and will drive the solution's future success. Subject matter experts from across the agency are developing the solution's business requirements and identifying challenges, risks and preliminary mitigation strategies. Performance metrics and outcome measures are also being developed, and other infrastructure and resource needs are being identified.

Once the baseline planning and reviews are completed, it is anticipated that the solution will be developed, tested, and deployed through multiple releases. Over the next five years, the Agency's business functions will be transformed in the following sequence: Citizenship, Immigrant, Humanitarian, and Non-Immigrant.

The following is high-level description of the overall solution:

**Account Management:** Customers will be able to establish on-line accounts, and they will have greater access to their case information. Representatives and organizations will also be able to establish accounts. Adjudicators will have better and more complete information available at their desktop, reducing search time and improving decision accuracy and consistency.

**Case Management:** Customers will be able to access benefit case information and self schedule appointments for Citizenship testing and oath ceremonies. Increases in decision-ready citizenship cases and decreases in paper files will improve agency efficiency. Legacy systems will be retired.

In summary, the solution provides the support and expertise needed to manage the sweeping organizational change that will result from this operational transformation. This includes the critical change management functions, such as comprehensive strategic communications planning that will foster two-way communications channels. It delivers capabilities incrementally, with the core capabilities delivered in the first few releases.

## VI. Administrative Appeals Office

### 18. Staffing and Work Load

**a.** Last year, the AAO had 61 adjudicators on staff, 7 Branch Chiefs and roughly 80 employees total. Have there been any significant changes in staffing at the AAO, or in the Branch Chief assignments?

***Response:*** We have increased the number of appeals officers working on waivers and legalization, and beginning next month we will increase the number of appeals officers working on EB-1, EB-2, and EB-3 appeals.

**b.** Have there been any noteworthy changes in your workload across any of the 7 branches over the past year?

***Response:*** No.

**c.** Have the recent changes in the Administration or the economic crisis impacted the funding of your office or any other aspect of the work you do?

***Response:*** No.

**d.** Do you regularly track (either generally or by product line) your rates of approval, remand, and denial? If so, would you share those statistics with our committee?

***Response:*** We do collect workload data for internal use. They are not, however, official USCIS production data and are not 100% accurate. Therefore, we do not share them with entities outside of the AAO. We do not generate data on rates of sustains, remands, and denials for inclusion into the USCIS annual statistical report.

### 19. Processing Times

**a.** The January 8, 2009 AAO processing times show that many product lines are current. However, there are still significant backlogs in several product lines, including: I-601 waivers (26 months), H-1Bs petitions (14 months), and I-140 EB-1 extraordinary ability cases (18 months). Please describe your plans to reduce the backlogs.

***Response:*** In the immediate future, we have been authorized funding for overtime for appeals officers currently on duty, and we have six newly selected employees who will begin to enter on duty next month and they will be assigned to waivers, H-1Bs, and I-140s. After we move to a larger office in July, I will request additional staffing to reduce the backlogs.

**b.** Are there any instances where you would entertain a request from our liaison committee to expedite the adjudication of a case if further delay in the decision would cause extreme hardship or would otherwise not be in the interests of justice?

***Response:*** Yes – please route expedite requests through your designated AAO liaison person. Such requests should explain a valid reason for expedited handling.

**20. Amicus Briefs**

In the past, where a case pending on appeal with your office presents a novel issue or is likely to have far-reaching consequences, the AAO has granted AILA an opportunity to submit an amicus brief for the AAO's consideration. AILA looks forward to continuing to offer its analysis when the occasion arises. AILA further suggests that the AAO develop a policy to reach out to AILA and other stakeholder organizations and to invite amicus briefs on issues that the AAO identifies for which broader input may be warranted. The Attorney General and the BIA have reached out to AILA and other stakeholder organizations on numerous occasions, and we believe that in so doing, have advanced jurisprudence and the interests of justice.

***Response:*** The AAO will propose a formal process for requesting and accepting amicus briefs in the AAO proposed rule. We encourage AILA to submit its comments on this issue during the proposed rule's comment period.

**21. Standard of Review**

The AAO applies a ***de novo*** standard of review. (*See, e.g.*, *Dar* v. *INS,* 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis); *Matter of [name not provided]*, File No. SRC 05 213 51887, at 6 (AAO Jan. 4, 2008). Last year, you mentioned that as a result of a recommendation from the USCIS Ombudsman, the AAO would likely publish a regulation addressing a number of issues, including formally setting forth the appellate standard of review. Please provide an update on the publication of the standard of review regulation.

***Response:*** The AAO Notice of Proposed Rulemaking has cleared USCIS and is currently in the DHS clearance process before it is published in the Federal Register. Subject to change, we expect the proposed rule will be published this fiscal year. We encourage AILA to submit comments on the proposed rule during the comment period.