Introduction - AILA commends USCIS for implementing the "H-ing Out" program to expand premium processing to include certain aliens in H-1B status who are reaching their maximum period of stay. While we have certain questions of clarification, and suggestions on further expansion, the reinstatement of premium processing for certain I-140 beneficiaries has been a relief to many H-1B nonimmigrants. AILA also welcomes the introduction of the two-year EAD for certain adjustment of status applicants as an important step in streamlining USCIS processes and reducing burdens on applicants for benefits.

AILA looks forward to continuing to work with USCIS and maintaining an ongoing dialogue on many of the issues contained in this agenda.

Policy and Guidance

1. The Weight of USCIS Policy Memoranda

In a recent decision from the Administrative Appeals Office (AAO), the AAO states that it is not bound by USCIS policy memoranda. By so doing, AILA believes the AAO has undermined the reliability and predictability of USCIS adjudications and caused confusion in the field. AILA respectfully requests that USCIS remind the Service Centers and Field offices that policy guidance is binding on all employees. Chapter 3.4 of the Adjudicator's Field Manual (AFM) explicitly states that policy guidance is binding on all USCIS employees and that those types of materials designated as correspondence, such as unpublished decisions of the BIA or AAO, are not to be given the same weight or "dictate any binding course of action".[1] AILA members have reported a number of denials that contravene current Service policy in favor of non-binding correspondence. In addition, AILA requests that USCIS remind the field that the AFM is also policy material and is binding on Service personnel as long as it is not in conflict with a "higher" authority.

Response: The AAO, like any other adjudicative program within USCIS, is required to follow applicable law, regulations, binding decisions and agency policies. If AILA is aware of decisions that are contrary to existing statutes, regulations, binding case law, precedent decisions, or applicable policy guidance, USCIS requests those decisions be brought to the attention of the AILA liaison.

2. Definition of Specialized Knowledge and Recent L-1B Denials

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 the Service's long standing guidance on this issue to deny L-1B petitions.

Response: If AILA is aware of decisions that are contrary to existing statutes, regulations, binding case law, precedent decisions, or applicable policy guidance, USCIS requests they be brought to the attention of the AILA liaison.

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

AILA members have reported a number of denials of H-1B petitions on the grounds that the petitioner, who has already established that it is a non-profit entity affiliated with an institution of higher education, has failed to establish that the beneficiary will be directly involved in a jointly managed program between the petitioner and an institution of higher education that directly and predominately furthers the essential purposes of an institution of higher education. These denials appear to rely on an unpublished non-binding AAO decision rather than the controlling June 6, 2006, Aytes Memorandum and the revised Chapter 31.2 of the Adjudicator's Field Manual.[2]

The Aytes Memorandum indicates that the requirement that the H-1B beneficiary participate in a jointly managed program must only be satisfied if the petitioner is a "third-party employer," that is, a petitioning employer that is neither the institution of higher education, nor the non-profit entity affiliated with the institution of higher education. Under the Aytes Memorandum, a petitioner that has already established that it is a non-profit entity affiliated with an institution of higher education ("qualifying institution") does not have to show further that the beneficiary of a particular H-1B petition be enrolled or employed in a program that forms the basis for the affiliation. The Aytes Memorandum distinguishes between "qualifying institutions" and "third party employers." AILA renews its request that USCIS send immediate instruction to the field stating that the Aytes June 6, 2006, remains in effect, and that adjudicators should not rely on unpublished decisions by the AAO that contradict Service policy memoranda.

Response: USCIS is evaluating this issue and is considering issuing clarifying guidance to the field.

4. Successor in Interest Denials

AILA requests that USCIS remind adjudicators that the September 12, 2006, Aytes Memorandum remains in effect and that petitioners claiming to be a "successor-in-interest" are required to demonstrate only that they have assumed substantially all of the rights, duties, obligations, and assets of the original entity and not all of the rights, duties, obligation, and assets.[3] AILA members

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[1] AFM, Chapter 3.4

[2] 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)

[3] Memorandum by Michael Aytes, Acting Associate Director, Domestic Operations, *AFM Update: Chapter 22: Employment-based Petitions,* HQPRD 70/23.12 (September 12, 2006) ("Aytes Memorandum") Page 20: "(5) Successor in Interest. On March 17, 1992, the Agency entered into an agreement with the DOL that the Agency (now USCIS) will make determinations regarding successor in interest on I-140s when a labor certification has already been issued. Successor in interest occurs when the prospective employer of an alien (and the entity that filed the certified labor

report receiving denials indicating that petitioners must demonstrate they have assumed all of the rights, duties, obligations and assets of the original employer in order to qualify as a successor-in-interest. These decisions contravene the clear language of the September 2006 Aytes Memorandum and current Service policy as stated in the Adjudicators Field Manual.[4]

Response: USCIS is in the process of reviewing its policies and is considering issuing clarifying guidance to the field in the very near future. At the moment, USCIS is holding denials based solely on the successor in interest issue. Held cases will be reviewed based on that forthcoming guidance.

5. Re-adjudication of Established Facts

AILA members report with increasing frequency the denial of nonimmigrant extension petitions based upon a determination that the prior petition was approved in error. AILA requests 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.[5] Particularly, AILA asks 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 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.

Response: USCIS makes every effort to credit its prior determination when considering an extension. 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. USCIS 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. 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. That said, petition extension requests will not be automatically approved, but will be adjudicated on their merits, based on the documentation submitted with the petition. If the documentation submitted is insufficient to meet the petitioner's burden of proof, or the law does not support approval of the request, an adjudicator lacks the legal authority to approve the request notwithstanding such deficiency, even if the agency may have previously approved a request involving the same petitioner/beneficiary and similar facts. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis.

6. Denials without Requests for Evidence (RFE) or Notices of Intent to Deny (NOID)

a. AILA members report with increasing frequency the denial of petitions and applications without the issuance of an RFE or NOID. While regulations at 8 CFR §103.2(b)(8)(ii) permit the denial of a petition or application where required initial evidence is missing in the exercise of discretion, the June 2007, memorandum from Donald Neufeld describing changes in regulations on RFE and NOID issuance and processing discourages denial without RFE: "If an application or petition lacks the required initial evidence, USCIS may deny the incomplete application or petition, though adjudicators are urged to exercise this option judiciously, or issue a request for evidence (RFE)."[6] A denial without RFE or NOID should only occur when there is clear evidence of ineligibility.[7] As described in the Yates RFE memo, "Clear evidence of ineligibility exists when the adjudicator can be sure that an applicant or petitioner cannot meet a basic statutory or regulatory requirement, even if the filer were to be given the opportunity to present additional information."[8] AILA requests that USCIS remind adjudicators that denials with RFE or NOID are discouraged even in cases where initial evidence appears to be missing, and that a case may only be denied where there is clear evidence of ineligibility.

b. With respect to what constitutes "initial evidence," the Neufeld RFE memo, and the corresponding revision to Chapter 10.1(c) of the AFM, provides guidance on what constitutes "initial evidence":

c. Initial Evidence Requirements: Certain requirements must be met before USCIS may consider an application or petition for possible approval. The instruction sheet for an application or petition includes requirements for proper filing of each type of application or petition. Every application or petition, regardless of the benefit sought, must include complete information in all required blocks, be signed, and – unless the fee is waived – include the correct fee.

AILA would like to request clarification on the guidance provided to adjudicators regarding initial evidence. Based on the Neufeld RFE memorandum, "initial evidence" is the minimum evidence to establish essentially *prima facie* eligibility for the

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certification application form) has undergone a change in ownership, such as an acquisition or merger, or some other form of change such as corporate restructuring or merger with another business entity, and the new or merged, or restructured entity assumes **substantially** all of the rights, duties, obligations, and assets of the original entity. "**(Emphasis added).**

[4] AFM, at Chapter 22.2(b)(5)

[5] 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"

[6] 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)

[7] 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

[8] Yates RFE Memorandum, page 2

benefit sought – to say it another way, "initial evidence" is simply sufficient evidence to get the application past the mailroom.

Response: 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 public to provide complete information in each Form and to include all required documentation with each filing. Incomplete cases take more time to resolve and take time away from processing cases in the queue that have been properly documented. So while USCIS makes every effort to avoid needless denials, USCIS may exercise the authority to deny an incomplete or poorly presented case. What constitutes initial evidence for a particular application or petition is generally set forth either in the applicable forms instructions and/or regulations pertaining to the particular classification or benefit sought. As referenced in Mr. Neufeld's June 1, 2007 memorandum, "The instruction sheet for an application or petition includes requirements for proper filing of each type of application or petition. Every application or petition, regardless of the benefit sought, must include complete information in all required blocks, be signed, and – unless the fee is waived – include the correct fee." 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.

7. "Boilerplate" and "Broad Brush" Requests for Evidence

a. AILA again expresses concern about the frequency with which "boilerplate" and "broad brush" RFEs are being issued. The Neufeld RFE memo discourages issuance of RFEs:

(2) Considerations Prior to Issuing RFEs. RFEs should, if possible, be avoided. Requesting additional evidence or returning a case for additional information may unnecessarily burden USCIS resources, duplicate other adjudication officers' efforts, and delay case completion.

The Yates RFE memo, which preceded the Neufeld RFE memo by two years, also sought to discourage RFEs:

(1) RFE - A RFE is most appropriate when a particular piece or pieces of necessary evidence are missing, and the highest quality RFE is one that limits the request to the missing evidence. Generally it is unacceptable to issue a RFE for a broad range of evidence when, after review of the record so far, only a small number of types of evidence is still required. "Broad brush" RFEs tend to generate "broad brush" responses (and initial filings) that overburden our customers, over-document the file, and waste examination resources through the review of unnecessary, duplicative, or irrelevant documents. While it is sensible to use well articulated templates that set out an array of common components of RFEs for a particular case type, it is not normally appropriate to "dump" the entire template in a RFE; instead, the record must be examined for what is missing, and a limited, specific RFE should be sent, using the relevant portion from the template. The RFE should set forth what is required in a comprehensible manner so that the filer is sufficiently informed of what is required. If a filing is so lacking in initial evidence that a "wholesale" RFE from a template seems appropriate, an adjudicator should confirm this with a supervisor before doing so.

It can be helpful to customers to articulate how and why information already submitted is not sufficient or persuasive on a particular issue. Customers can become confused and frustrated when they receive general requests for information that they believe they have already submitted. The effort it takes to assess existing evidence helps either to spur the customer to provide persuasive evidence, or to form the basis of a convincing denial notice in the absence of such new evidence.

AILA requests that USCIS remind examiners that RFEs are to have a specific focus to provide petitioners and applicants sufficient information regarding the requested evidence to permit the petitioner or applicant to submit a responsive reply that addresses the examiner's concerns.

b. According to the AFM and memorandum, officers are instructed specifically to obtain information contained in USCIS records and other sources before going back to the applicant/petitioner. We agree with the AFM that it would save more time to obtain information from USCIS databases than to prepare and mail a request for such information. Please confirm what information adjudicators have access to regarding prior petitions of the petitioner and/or the applicant.

Response for a & b: The regulations at 8 C.F.R. § 103.2(b)(8)(iv) place the onus on the petitioner/applicant to present all required initial evidence when requesting an immigration benefit. The regulations further permit, but do not require, the agency to request further evidence where all required initial evidence has been submitted, but does not establish eligibility. USCIS encourages its adjudicators, for the reasons stated in the Yates and Neufeld memoranda you have quoted above, 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 and the petitioner/applicant. 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. In responding to an RFE, the petitioner/applicant should make every effort to provide the information requested, or articulate clearly, in its response to an RFE, the reasons why it believes that the RFE is overly broad or fails to address the particular issue or issues identified by the adjudicator. As noted above, the statute, regulations, as well as relevant decisional law, place the burden, in each case, on the petitioner or applicant to prove eligibility for the benefit sought. It is in the strong interest, therefore, of the applicant/petitioner to provide all relevant documentation – including that relating to prior submissions to the agency, if relevant, with its original submission and/or in response to an RFE – in meeting its burden of establishing eligibility for the benefit sought. Please provide examples where "boilerplate" RFEs appear to have been issued.

c. Are officers trained on corporate terminology and financial information and assessment? What resources are used for this

training?

Response: Yes, officers are trained on corporate terminology as well as informed of further references that are available such as: Adjudicator's Field Manual Chapter(s) 14.7 (Supplemental Materials and Non-Governmental Resources), 14.9 (Internet and Internet Resources), 14.10 (Procedures for Requesting Library of Congress Research), and 32.2 (Terminology) with terms and statutory and regulatory cites referenced.

8. Seeking Information from External Sources

The Neufeld RFE memo suggests that examiners should seek "evidence or information not submitted with the application … readily available from external sources…." AILA has several concerns with this guidance.

a. The Neufeld memo also states that "an adjudicator should strive to request the evidence needed for thorough, correct decision-making. An adjudicator should not 'fish' for evidence." Under what circumstances are examiners to look to "other sources?" Must the examiner have a clear and articulable reason to be looking for information outside of the evidence submitted with the application, and, if so, what reasons are satisfactory? Without such guidance, encouragement to go to "external sources" could easily lead to "fishing expeditions."

b. What is the standard examiners are to use to determine the reliability of external sources? Where an external source is on the Internet, are examiners cautioned that Internet content is unregulated and material on the Internet can be unreliable and/or outdated?

c. Are external sources recommended or suggested to examiners? If so, what are they and what is the mechanism to bring concerns about specific sources to the Service's attention? Where an examiner intends to rely on an external source, AILA requests that USCIS remind examiners that the regulation at 8 CFR § 103.2(b)(16)(i) requires the examiner to advise the petitioner or applicant of the derogatory evidence and provide the petitioner or applicant with an opportunity to rebut the information.

Response for a, b & c: USCIS adjudicators have the authority to research and confirm the veracity of any relevant information. They are not necessarily "looking for information outside of the record," but may only be fact-checking assertions and evidence relating to the petition. For example, they may check a State's online corporate records to confirm that a petitioner actually is incorporated as claimed. They may also be confirming the standing of the attorney of record.

If this research yields reliable evidence that may adversely affect the adjudication, then we agree that, before relying on the information, a notice of derogatory information is required in accordance with 8 C.F.R. § 103.2(b)(16)(i). This provides a petitioner or applicant the opportunity to rebut any information discovered by an adjudicator from an external source.

9. Preponderance of the Evidence

The general standard of proof in petition and application proceedings is "preponderance of the evidence." [9] The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true." In a binding Adopted Decision, the AAO says:

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See U.S. v. Cardozo-Fonseca, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring).[10]

AILA members frequently see RFEs and denials where it is evident from the language of the notice that a more stringent standard is being applied, for example, where the notice states that the evidence submitted did not "clearly establish" eligibility for the benefit sought. Where the proper standard is not applied, more RFEs and denials are issued, leading to slowdowns in efficiency and productivity. It is in the interests of USCIS to reinforce the concept of "preponderance of the evidence" in the adjudication of benefits applications and petitions.

AILA requests that USCIS HQ remind examiners that the proper standard of evidence is "preponderance of the evidence," and to reinforce prior guidance, including the Yates RFE memo, that discuss the "preponderance of the evidence" standard and its application in adjudicating petitions and applications.

Response: Generally, the standard of proof is "preponderance of the evidence." Depending on the specific benefit or relief sought, a higher standard of proof may apply. For example, in certain spousal Form I-130 cases, as specified in section 204(a)(2)(A)(ii) or 245(e) of the Act, the petitioner may be required to prove that the marriage is bona fide by clear and convincing evidence. Similarly, the Eighth Circuit recently reaffirmed that, since an adjustment of status applicant is assimilated to the status of an applicant for admission, the applicant must establish "clearly and beyond doubt" that he or she is eligible for adjustment. *Kirong v. Mukasey,* 529 F.3d 800, 804 (8th Cir. 2008). Adjudicators receive training on the appropriate burden of proof standards during their USCIS Academy training. If you receive a decision or a 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.

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[9] See *Matter of Chawathe*, (A74 254 994, AAO Adopted Decision, January 11, 2006).
[10] Id. at page 8

10. Premium Processing Issues

Clarification and Modification of the "H-ing Out" Program

USCIS and AILA have been engaged the discussion of the issue of beneficiaries running out of time in H-1B status because of delays in labor certification application processing and I-140 petition processing for many years. Most recently USCIS has attempted to ameliorate the hardship to certain individuals "H'ing Out" by reinstating premium processing for those I-140 applicants who must have an approved I-140 to be eligible to apply for a three year extension of H-1B status.[11]

a. **Request to modify the program to include those individuals not currently in H-1B status**

Prior to the reinstatement of premium processing for this discrete group of individuals, many attorneys and petitioners had been submitting requests to the Texas and Nebraska USCIS Service Centers for expedited handling of I-140 petitions under the established USCIS expedite criteria.[12] However, USCIS had previously indicated that requests for expedited handling must meet the required expedite criteria above and beyond the mere fact that an individual was timing out of H-1B status. AILA members have reported that, as a result of the difficulty of having an expedite request approved, many beneficiaries were forced to leave the United States when their time in H-1B status had expired. AILA members have also reported that in some instances these individuals were able to remain in the United States by changing to another nonimmigrant status if eligible (e.g. H-4 if they had a qualifying spouse) but were no longer able to accept authorized employment.

AILA believes that under the December 5, 2006, Aytes Memorandum[13] these individuals are still eligible for additional H-1B time under the AC21 once their I-140 petitions are approved. However, under the new premium processing initiative, these individuals are not eligible to use premium processing as they have already reached the maximum period of admission in H-1B status and are not currently in H-1B status.

AILA respectfully requests that USCIS consider the inclusion of these individuals, as they are also in need of immediate relief. According to recent information provided by Service Center Operations ("SCOPS ")[14] as of September 12, 2008, USCIS had received approximately 1,300 requests for I-140 petition premium processing. AILA understands USCIS' desire to limit the reinstatement of premium processing to ensure that the program does not adversely affect other workloads. However, AILA does not believe that the additional numbers would significantly affect USCIS workload while the benefit to the small group of eligible applicants would be substantial.

Response: USCIS is committed to expanding the premium processing program to cover all alien beneficiaries who may extend their status under section 104(c) of AC21. Guidance will be forthcoming with details and parameters.

i. Clarification of June 11, 2008, Fact Sheet

AILA respectfully requests that USCIS review its current interpretation and clarify that those beneficiaries who are nearing their 7th year, 8th year, or beyond of H-1B time are also eligible for I-140 petition premium processing under the June 11, 2008, announcement. It was AILA's initial understanding that although the June 11, 2008, USCIS Fact Sheet announcing the reinstatement of premium processing for certain I-140 beneficiaries stated that beneficiaries are only eligible in their 6th year of H-1B nonimmigrant stay, this statement would be read to reach beneficiaries in their "last" year of H-1B time.[15] AILA has subsequently been advised by SCOPS that the fact sheet should be read literally and that those beneficiaries past their initial six years are not currently eligible to benefit from the reinstatement of premium processing.

Applying the policy on premium processing to those who are post-6th year in H-1B status is consistent with the overall objectives USCIS sought to address in announcing the original policy. Those in post-6th year for whom an I-140 is approved will be eligible for three-year H-1B extensions, which will reduce demand on USCIS resources. Moreover, there will be situations where an alien will be ineligible for additional one-year H-1B extensions due to changes in employment, and for whom the only relief will be a three-year extension after approval of an I-140. These are sound reasons to permit premium processing for these additional classes of H-1B aliens.

Response: USCIS will honor premium processing requests for this select group provided the beneficiary is within 60 days of his/her H-1B expiration date, is not eligible for an extension of H-1B status under section 106(a) of AC21, and fits the other parameters of PPS reinstatement as outlined in the June 11, 2008 Fact Sheet. If any cases fitting this particular fact pattern have not received premium processing when requested, please bring those to the attention of your AILA liaison who can work directly with the Service Centers.

b. Expansion of Premium Processing for H-1B and E-3 Nonimmigrants

USCIS indicated during our spring 2008 meeting that it hoped to expand premium processing to include various other

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[11] USCIS Update, June 11, 2008: "USCIS is limiting Premium Processing Service for Form I-140 petitions that are filed on behalf of aliens: Who are **currently in an H-1B nonimmigrant status**; Whose sixth year will end in 60 days; Who are only eligible for a further extension of H-1B nonimmigrant status under section 104(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21); and Who are ineligible to extend their H-1B status under section 106(a) of AC21. **(Emphasis added.)**

[12] Humanitarian Situation, Extreme Emergent or Unforeseen Circumstances, Severe Financial Loss to Company or Individual or Service Error.

[13] Memorandum from Michael Aytes, Associate Director, Domestic Operations, *Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the Six-Year Maximum; and Aliens Who have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year,* HQPRD 70/6.2.8 & 70/6.2.12, AD 06-29 (December 5, 2006) ("Aytes Memorandum")

[14] AILA/SCOPS Q&A (September 17, 2008), Question 8.

[15] Fact Sheet, *USCIS Offers Premium Processing Service For Certain Form I-140 Petitions Starting June 16, 2008*, (http://www.uscis.gov/files/article/premiumproc_factsheet_i140_061108.pdf)

nonimmigrant classifications and would consider proposing regulations if necessary to allow for such expansion as it was able to reduce processing times and eliminate the temporary backlogs of applications caused by the summer 2007 surge of filings. It has now been over a year since the surge filings and USCIS appears to have been able to make some progress on the temporary backlogs especially for N-400 Applications for Naturalization.

AILA respectfully renews its request to expand premium processing to H-1B1 and E-3 nonimmigrants for initial, extension and change of employer petitions to ameliorate the continuing hardship experienced by E-3 nonimmigrants who are not eligible to automatically extend their work authorization for 240 days after the timely filing of a petition to extend to their status as most other nonimmigrants are under 8 CFR 274.a12(b)(20).[16] Until 8 CFR 274a.12 is amended to include E-3 nonimmigrants these individuals and their employers are subject to forced and costly interruptions in employment.

USCIS indicated in our spring 2008 meeting that it believed the number of H-1B1 and E-3 nonimmigrants impacted by the inability to use premium processing was relatively low. The low volume of these types of petitions is also the explanation given for the failure of these classifications to be listed in USCIS online processing time guides. Thus, under current conditions, H-1B1 and E-3 nonimmigrants are not able to avail themselves of premium processing nor are they able to judge how long their petitions will take to be processed.

It is for all these reasons that AILA urges USCIS extend premium processing to H-1B1 and E-3 nonimmigrants as the overall impact on USCIS' workload would be minimal while the benefit to the H-1B1 and E-3 nonimmigrants and their employers would be substantial.

Response: USCIS will consider possible expansions of the premium processing program to these classifications when it is operationally feasible. At the current time, USCIS cannot expand PPS to encompass this additional workload and types of cases.

11. Child Status Protection Act (CSPA)

AILA commends USCIS for issuing the most recent memorandum modifying the interpretation of certain provisions of the Child Status Protection Act (CSPA) issued on May 6, 2008.[17] AILA respectfully requests clarification on a number of issues discussed in Neufeld Memorandum.

a. Please confirm that an application for adjustment of status does not need to have been filed prior to the effective date of the CSPA in order for children of United States citizens to benefit from the CSPA so long as the child was under 21 at the time the I-130 was filed. AFM chapter 21.2(e)(1)(i), which provides guidance on CSPA coverage for adjustment as an Immediate Relative (IR), states, "it does not matter whether the alien reaches the age of 21 before or after the enactment date of the CSPA, when the petition was filed, or how long the alien took after the petition approval to apply for permanent residence provided the alien did not have a final decision prior to August 6, 2002, on an application for permanent residence based on the immigrant visa petition upon which the alien claims to be a child."

   While this language is helpful, it does not clearly acknowledge the binding holding of Matter of Rodolfo Avila-Perez, 24 I&N Dec. 78 (BIA 2007), which found CSPA coverage even where an I-485 application was filed after the effective date of the CSPA. Without this clarification to the memorandum, the AFM's language – "provided the alien did not have a final decision prior to August 6, 2002 on an application for permanent residence." – erroneously could be construed to require a pending adjustment of status application prior to August 6, 2002, a result specifically struck down in Avila-Perez.

   Response: USCIS confirms that the language at AFM chapter 21.2(e)(1)(i) addressing CSPA coverage for adjustment as an Immediate Relative (IR) does not require a pending adjustment of status application prior to August 6, 2002.

b. Will USCIS issue further guidance on the Retention of Priority Date and automatic category conversion provision contained in INA section 203(h)(3) for preference aliens? Can USCIS explain if these foreign nationals will have an opt-out provision that they could exercise (For example, currently for Mexico the F2B priority date is further behind than the one for F4).

   Response: These issues are currently the subject of ongoing litigation before the BIA (USCIS has certified two decisions and requested publication of the BIA's decision) and in the Federal Courts. Upon resolution of the litigation, USCIS will issue appropriate guidance.

c. Finally, could a foreign national derivative beneficiary on an I-140 petition who ages out, be able to use the priority date from the I-140 for a subsequently filed I-130 as a F2B?

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[16] 8 CFR 274.a12(20): #A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (b)(5), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13), (b)(14), (b)(16), and (b)(19) of this section whose status has expired but who has filed a timely application for an extension of such stay pursuant to §. **214.2** or **214.6** of this chapter. These aliens are authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay. Such authorization shall be subject to any conditions and limitations noted on the initial authorization. However, if the district director or service center director adjudicates the application prior to the expiration of this 240 day period and denies the application for extension of stay, the employment authorization under this paragraph shall automatically terminate upon notification of the denial decision. (Revised 1/1/94; 58 FR 69217)

[17] Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, *Revised Guidance for the Child Status Protection Act (CSPA)*, HQ DOMO 70/6.1, AFM Update AD0-04 (May 6, 2008)("Neufeld Memorandum")

Response: The answer to this question is also dependent upon the outcome of the litigation described above, and the resolution of this issue will be included in any guidance issued as described above.

12. A Fee Waiver Should Be Available For Form I-192 for U nonimmigrants

AILA is deeply concerned that USCIS will not make available a waiver of the filing fee for an I-192 application to aliens seeking U nonimmigrant status. In recognition of the humanitarian purpose behind U nonimmigrant status, and consistent with the legislative intent to assist immigrant crime victims,[18] USCIS determined that it would not charge a fee for filing Form I-918.[19] USCIS also recognized that anecdotal evidence indicates that applicants under this program are generally deserving of a fee waiver.[20] While AILA appreciates USCIS' decision to issue a blanket fee waiver for Form I-918, not making a waiver of the I-192 fee available to these applicants will undermine Congress' dual purpose of assisting law enforcement officials in the investigation and prosecution of crimes and assisting immigrant crime victims.

AILA encourages USCIS to either eliminate the fee for Form I-192 for principal and derivative U applicants, or to allow a fee waiver for Form I-192 when submitted in connection with an application for U nonimmigrant status. In the preamble to the regulations, USCIS recognizes that "[t]his program involves the personal well-being of a few applicants and petitioners, and the decision to waive the petition fee reflects the humanitarian purposes of the authorizing statutes." In keeping with this, the interim rule addresses a waiver for all fees associated with U nonimmigrant status applications – all except Form I-192. The fee for this program cannot be considered truly "waived" if a fee is required for Form I-192. This is particularly true for U visa applicants who must first be admissible in a nonimmigrant status.[21] If a petitioner is not admissible, he or she is required to file Form I-192 as initial evidence of eligibility for this status.[22] Therefore, Form I-192 is clearly recognized to be an integral part of an application.

Moreover, the filing fee associated with Form I-192 is $545, no slight burden.[23] According to non-profit members of AILA who work with immigrant crime victims, the vast majority of their clients granted interim relief are inadmissible on at least one ground, and would, thus, be required to file Form I-192 in connection with their application for U nonimmigrant status. This substantial fee is not limited to the principal applicant, but applies to all derivatives who fail to meet admissibility requirements and must also file a separate Form I-192 and pay $545 filing fees. For a family of four the filing fees would be $2,180.

AILA is also concerned about other fees connected with the U visa. For example, a U visa applicant who is in removal proceedings is required to file Form I-246, "Application for Stay of Removal." The fee associated with this form is $155, and is not waivable. In order to obtain a U visa for re-entry to the United States, an applicant must have a valid, unexpired passport. If an applicant is not able to obtain a passport from his or her country of origin, then he or she must file Form I-193, "Application for Waiver of Passport and/or Visa" with the accompanying non-waivable fee of $545. An example of a person who would need to submit a Form I-193 would be a trafficking victim whose passport was taken by her trafficker and who needs to travel outside of the United States due to an unforeseen emergency. Moreover, an applicant who would need to extend U nonimmigrant status, such as an applicant granted interim relief over four years ago and filing the I-918 now, would be required to file a Form I-539 "Application to Extend/Change Nonimmigrant Status" with the accompanying $300 fee. Again, this fee is not waivable.

It is imperative that USCIS revise the interim rule so that no fee is associated with filing Form I-192, or, in the alternative, that a fee waiver be made available for Forms I-192, I-193, I-246, and I-539 filed in connection of U nonimmigrant status.

Response: While there is no fee waiver currently available for Forms I-192 and I-193, USCIS intends to publish a regulation in the future that will allow waivers of the I-192 and I-193 fee for applicants filing for both U nonimmigrant status as well as T nonimmigrant status (victims of human trafficking). A regulation containing these provisions has recently cleared OMB review and we expect that it will be published in the near future.

USCIS does not adjudicate Form I-246. Therefore, inquiries related to fee waivers for this form should be directed to Immigration and Customs Enforcement.

With regard to the I-539, the fee may not be waived and no changes are planned to that policy. However, for the circumstances described in the question, USCIS is currently considering whether filing of Form I-539 and the fee would be required, or if an alternative method to provide a short term extension can be implemented for this group.

13. Regulations

Please provide an update on the status of regulations regarding the following: AC21, CSPA, T regulations for adjustment of status, U, EB-5, religious workers, TN (3 year periods of admission) and Replacement of Forms I-551 without an expiration date (I-90s).

Response:

AC21Proposed Rule: "Implementation of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), the Visa Waiver Permanent Program Act (VWPPA), and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA)." This rule is under development within USCIS.

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[18] 72 Fed. Reg. 53031 (Sept. 17, 2007).
[19] Id.
[20] Id.
[21] INA § 212(a)
[22] See 8 CFR § 214.14(c)(2)(iv). Even a process where USCIS would conduct a review of a U visa application to determine whether a waiver is necessary before requiring submission of an I-192 waiver application, though a welcome accommodation, would merely delay having to pay this fee and does not eliminate it.
[23] 72 Fed. Reg. 29851 (May 30, 2007). (Noting that under the revised fee schedule effective July 30, 2007, Form I-192 is not eligible for a fee waiver under any circumstances.)

CSPA Proposed Rule: "Implementation of the Age Out Protections Afforded Under the Child Status Protection Act." This rule is under development within USCIS.

T Regulations for Adjustment of Status Interim Rule: "Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status." This rule has undergone review at the Office of Management and Budget and will likely be published in the near future.

EB-5 Proposed Rule: "Treatment of Aliens Whose Employment Creation Immigrant Petitions Were Approved After January 1, 1995 and Before August 31, 1998." This rule is under development at USCIS.

Religious Workers Final Rule: "Special Immigrant and Nonimmigrant Religious Workers." This rule is undergoing Executive Order 12866 review at the Office of Management and Budget.

TN (3 yr) periods of admission Final Rule: "Period of Admission and Stay for Canadian and Mexican Citizens Engaged in Professional Business Activities – TN Nonimmigrants". 73 FR 61332, October 16, 2008

Replacement of Forms I-551 Final Rule: "application Process for Replacing Forms I-551 without an Expiration Date." Public comments on the proposed rule are being reviewed.

14. Matter of Perez-Vargas

At the conclusion of our spring 2008 meeting USCIS indicated that guidance on the issue of individuals having their 204(j) claims resolved when renewing an adjustment of status application in removal proceedings would be forthcoming in the near future. Can the Service provide an update on when guidance may be released on this issue?

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

15. Use of P.O. Box versus Street Address to Determine Receipt Date

AILA respectfully requests that USCIS reverse its current policy and consider the date the filing is received at a USCIS designated P.O. Box as the date of receipt instead of the date the filing is brought on site to a Service Center or other office. The issue of whether or not a document is timely filed is critical and affects many filings, including but not limited to petitions filed under the H-1B cap, I-140 petitions with an accompanying labor certification which may be expiring, I-485 applications subject to a quota backlog, Request for Evidence (RFE) responses, appeals, and extensions.

In March 2008, USCIS posted to its website "Questions and Answers #1: H-1B Petition Mailing During Cap Season" [24]following question and answer:

> Question 3. How will USCIS handle petitions filed via U.S. Postal Service (USPS)? If a petition is delivered to the P.O. Box designated by USCIS on April 1 through April 7, will USCIS treat those petitions as timely filed and include them in the random selection process?
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> Answer: USCIS does not consider the package received or timely filed until it is actually on-site at the Service Center. The service centers pick up correspondence delivered to the P.O. Box at one or more scheduled times during the day. Therefore, while customers may file applications by USPS at the P.O. Box, delivery to that P.O. Box does not ensure that the filing will be picked up by USCIS the same day it is placed in the P.O. Box by the USPS, and thus, will not be considered timely filed.

AILA believes that USCIS should adopt the policy that a timely delivery to a P.O. Box designated by USCIS is sufficient. Otherwise, USCIS alone controls the receipt of time-sensitive matters, unfairly placing at risk petitions and applications by those relying on the USPS, and giving USCIS complete discretion to decide when something is timely filed. Moreover, AILA is concerned as the public has no control over when the mail is picked up by USCIS from the P.O. Box and brought on-site.

If USCIS will not reverse the current policy then AILA requests that the public be fully informed of the policy on USCIS website and in the form instructions for every form type directed to a P.O. Box. Present notice of this fact is inadequate. USCIS advocates the use of P.O. Boxes on its website and in its form instructions for mailing in immigration applications. USCIS does not caution on its website or in its form instructions that delivery to a P.O. Box does not ensure timely filing, that the filing may not be picked up by USCIS on that same day, and that USCIS does not consider the package received or timely filed until it is on-site at the Service Center.

Response: USCIS will advise the public on our current policy again at the website, with an update in the Press Room section. For forms processed at Lockbox facilities, which also uses P.O Boxes, mail is delivered to the Lockboxes by the USPS three times daily. Items delivered to the Lockbox are opened and processed within 24 hours and date stamped upon receipt.

16. Amending 8 CFR § 274.a(12) to include E-3 Australian and H-1B1 Nonimmigrants

AILA proposes the following regulatory changes to 8 CFR §274a.12 to include E-3 Australian Nonimmigrants and to explicitly list H-1B1 Chilean and Singaporean Nonimmigrants to the class of individuals able to continue employment for a period not exceeding 240 days beginning on the date of the expiration of their authorized period of stay after the timely filing of an application for extension of status:[25]

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[24] USCIS Website: Home > Services & Benefits > Employer Information. Last visited March 28, 2008. (As of September 29, 2008 no longer accessible.)

[25] 8 CFR §274a.12(b)(20) pursuant to a timely nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (b)(5), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13), (b)(14), (b)(16), and (b)(19) of this section whose status has expired but who has filed a timely application for an extension of such stay pursuant to §. **214.2** or **214.6** of this chapter. These aliens are authorized to continue employment with the same employer for

E-3 Nonimmigrants proposed regulatory change: "8 CFR 274.a 12 (b)(5): A nonimmigrant treaty trader (E-1), treaty investor (E-2), or E-3 treaty professional pursuant to Sec. 214.2(e) of this chapter. An alien in treaty trader or treaty investor status may be employed only by the treaty-qualifying company through which the alien attained the status. Employment authorization does not extend to the dependents of the principal treaty trader, treaty investor or treaty professional (also designated "E-1," "E-2," or "E-3"), other than those specified in paragraph (c)(2) of this section;"

H-1B1 Nonimmigrants proposed regulatory change: "8 CFR 274.a 12 (b)(9): A temporary worker or trainee (H-1, H-2A, H-2B, H-3 or H-1B1), pursuant to Sec. 214.2(h) of this chapter. An alien in this status may be employed only by the petitioner through whom the status was obtained. In the case of a professional H-2B athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after acquisition by the new organization, within which time the new organization is expected to file a new Form I-129 to petition for H-2B classification. If a new Form I-129 is not filed within 30 days, employment authorization will cease. If a new Form I-129 is filed within 30 days, the professional athlete's employment authorization will continue until the petition is adjudicated. If the new petition is denied, employment authorization will cease;"

Response: USCIS appreciates the impact on the business community and has taken this request under advisement.

17. Combined EAD/AP documents.

AILA requests an update on USCIS plans to test and issue a combined EAD/Advance Parole (AP) document. As discussed in our spring 2008 agenda and meeting and in a number of other public forums, AILA understands that USCIS believes a combined EAD/AP document may help further the agency's goal of increased efficiency and workload reduction. AILA is concerned that the use of such a document by certain individuals will make them subject to the three- and ten-year bars to inadmissibility under INA 212(a)(9)(B)(i)(I) and (II). The current stand-alone AP document contains warnings on travel by those individuals who may trigger the bars upon departure from the United States. If USCIS moves forward with the issuance of a combined EAD/AP document AILA strongly urges USCIS to include such warnings on the new combined document.

In addition to ensuring that the appropriate warnings are included on any combined EAD/AP document, please find the following additional questions:

a. Would an applicant be able to affirmatively request or to opt-out of a combined document and retain the ability to request a stand-alone EAD and AP?

Response: Once the combined card becomes the standard, it will replace the separate documents and an opt-out will not be available.

b. Does USCIS contemplate creating a separate application form for a combined document?

Response: Initially, separate forms will be required. Ultimately there will be a combined form.

c. In the past USCIS has indicated that it does not review advance parole applications to determine whether an applicant is eligible to travel outside the United States and return (i.e. trigger the three- and ten- year bars). If stand-alone EADs and APs become obsolete, will USCIS change its policy and begin to review applications to ensure that an applicant can travel and return without triggering the bars on admissibility?

Response: USCIS will not be making this determination in the future.

In addition to the Notice that currently accompanies the approved Advanced Parole document the instructions for Form I-131 and Form I-485 specifically warn applicants of the risk of traveling abroad after accruing unlawful presence. When a combo card is issued, there will be an Advisory Notice included in the envelope.

18. I-9 Handbook

In our spring 2008 meeting, AILA requested clarification on various I-9 issues which USCIS indicated it would review in more depth. AILA requests an update on when guidance on those issues will be forthcoming.

Response: The I-9 issue regarding the I-9 requirements for employers of porting H-1B employees continues to be under discussion. Please specify any remaining I-9 issues that were pending following the spring 2008 meeting.

In addition to the questions previously discussed, AILA requests guidance regarding the following additional I-9 and E-Verify issues:

a. Cap-Gap Provisions

On April 8, 2008, DHS published an interim final rule granting an F-1 student an automatic extension of OPT work

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a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay. Such authorization shall be subject to any conditions and limitations noted on the initial authorization. However, if the district director or service center director adjudicates the application prior to the expiration of this 240 day period and denies the application for extension of stay, the employment authorization under this paragraph shall automatically terminate upon notification of the denial decision. (Revised 1/1/94; 58 FR 69217)

authorization provided he or she is the beneficiary of a timely filed H-1B cap petition requesting a change of status. On May 23, 2008, DHS issued additional guidance indicating that the following documents were required to properly complete an I-9 for an eligible student:

- Expired EAD (issued under category I(3)(i)(B) or (c)(3)(i)(C));
- USCIS receipt notice showing receipt of H-1B petition; and
- Cap gap Form I-20 (endorsed by the DSO to show that the student's employment authorization is still valid)

The added requirement of the cap-gap I-20 seems inconsistent with an "automatic" extension and does not specifically appear in regulations.

i. AILA requests confirmation on whether or not the cap-gap endorsed Form I-20 is a requirement for I-9 purposes.

Response: Yes, the expired Form I-766 EAD (issued under category (c)(3)(i)(B) or (c)(3)(i)(C)) combined with a "cap gap" Form I-20, endorsed to show that the student's employment authorization is still valid, and USCIS receipt notice (Form I-797, Notice of Action), showing receipt of the H-1B petition are the equivalent of an unexpired Employment Authorization Document under List A, #4 of the Form I-9.

ii. If a cap-gap endorsed Form I-20 is required, AILA requests USCIS update the next version of the I-9 Handbook for Employers to include this requirement. In the interim, until a revised Handbook is updated, AILA requests that this guidance be published on USCIS' website.

Response: USCIS will include the cap-gap documentary requirements in the next version of the M-274, Handbook for Employers. The requirements were posted on the USCIS website on the "Press Room" page as of May 23, 2008.

b. E-Verify

i. When an employer registers for E-Verify, please confirm that a Form I-9 must be completed before the E-Verify query is processed.[26]

Response: Employers must have a fully completed Form I-9 that is consistent with E-Verify requirements for a newly hired worker prior to running an E-Verify query on the employee. In most cases this will be a newly completed Form I-9, but in the case of a rehired individual who was previously hired within 3 years, the employer may rely under 8 CFR 274a.2(c) on a previously completed Form I-9 (updated if necessary) rather than complete a new Form I-9. However, as a previously completed Form I-9 – even one showing a continuing basis for work authorization as required by section 274a.2(c) – may not comply with E-Verify program requirements such as List B documents with photographs, and may contain outdated information that will lead to an unnecessary tentative nonconfirmation (such as a section 1 attestation of LPR status by an employee who has subsequently been naturalized) we recommend completion of a new Form I-9 in this situation. Note that this rehire situation is different from either "continuing employment" in which there is no Form I-9 obligation or "reverification" of a current employee whose work authorization expires; in neither of these cases should an E-Verify query be made.

ii. The current version of Form I-9 states that it is not mandatory for the employee to provide a social security number.

Response: It is a statutory requirement under IIRIRA §403(a)(1)(A) that an employee provide his or her social security number when his or her employer participates in E-Verify. The current version of the Form I-9 specifically states: "Providing the Social Security number is voluntary except for employees hired by employers participating in the USCIS Electronic Employment Eligibility Verification Program (E-Verify)" (emphasis added).

iii. Please confirm that it is not discriminatory to request the social security number for E-Verify purposes.

Response: It is a statutory requirement under IIRIRA §403(a)(1)(A) that an employee provide his or her social security number when his or her employer participates in E-Verify.

iv. Not all of the List B documents contain a photograph. Please confirm it is not discriminatory to require List B documents contain a photograph when an employer is registered for E-Verify.

Response: It is a statutory requirement under IIRIRA §403(a)(2)(A)(ii) that a "List B" identity document presented to an E-Verify employer must contain a photograph.

c. Asylees and Refugees

The Handbook for Employer's states on page 7, item number 3, that if a refugee presents an I-94 card endorsed with a Refugee admission stamp, it is only valid as a receipt for 90 days. The Handbook explains further that a refugee must present further evidence of work authorization after the 90 day period. This instruction seems inconsistent with both 8 CFR § 274a.12

[26] AILA understands that requirement may change when the Federal Contractor regulation is finalized and existing employees must be run through E-Verify.

(a)(3) and two memorandums issued by USCIS.[27] The memoranda and regulation acknowledge that the asylees and refugees are authorized to work incident to status. The memoranda specifically indicate that an asylee (and a refugee) may simply present evidence of their status, and are then recognized as having unlimited work authorization incident to status.

i. AILA requests confirmation that the information in the Handbook is in error, and that the memoranda and regulation pertaining to this issue are still controlling.

Response: The M-274 Handbook is neither erroneous nor inconsistent with USCIS policy memoranda. The Handbook accurately restates the regulatory provision for temporary acceptance of refugee documentation other than the EAD as a receipt (8 CFR § 274a.2(vi)(C)). Refugees and asylees are work authorized incident to status, but that does not mean that their I-94 by itself is acceptable evidence of work authorization for Form I-9 purposes. As the cited memoranda discuss, work authorization and evidence of work authorization are two different things. Asylees and refugees should apply for an EAD as acceptable evidence for Form I-9 purposes of the work authorization they possess upon being granted their status. Alternatively, they may present acceptable List B and C documents, such as a driver's license and unrestricted social security card. As noted, the regulations also provide for temporary acceptance of the refugee Form I-94 as a receipt. We understand the concern that this provision does not address asylees, and it is a matter for consideration in future rulemaking on this subject.

19. Work Authorization for B-1 Domestic Workers Incident to Status

AILA respectfully requests that USCIS amend 8 CFR § 274a.12(a) to include B-1 domestics as aliens authorized employment incident to status and eliminate the need for these nonimmigrants to apply for a work authorization document. B-1 nonimmigrants admitted as personal/domestic employees of foreign nationals in nonimmigrant status or as employees of U.S. citizens on temporary assignment to the United States are currently designated under 8 CFR § 274a.12(c)(17) as "aliens who must apply for employment authorization."[28] Under 9 FAM 41.31 Note 9.3 an individual cannot be properly admitted to the United States as B-1 nonimmigrant under this provision unless it is for the express purpose of being employed as a personal or domestic employee. As the FAM defines the parameters of employment, AILA believes that this category of B-1 nonimmigrants fits squarely into the category properly classified as authorized to work incidental to status and that this section of the regulations should be amended to remove the EAD requirement of B-1 personal/domestic employees.

Pursuant to 9 FAM 41.3 N.9.3, consular officers are charged with reviewing the credentials of the personal/domestic employee, the circumstances of employment including an employment contract and certification of payment of the prevailing wage before this type of B-1 visa may be issued. In addition, it is consular practice to designate specifically on the visa foil that the B-1 is in the classification of personal/domestic employee including the name of the individual's employer. Accordingly, all information necessary to immediately determine that a particular individual is qualified for employment as a B-1 personal/domestic worker is on the record at the time of entry just as would be the case for an H-1B or an L-1 nonimmigrant.

Requiring these types of B-1 nonimmigrants to apply for work authorization upon entry appears to create duplicate and unnecessary work for USCIS as all aspects of the individual's employment have been vetted by the issuing consular officer prior to visa issuance and entry to the United States. It does not appear necessary for USCIS to make any further determination on eligibility for employment.

Under current USCIS regulation, a B-1 personal/domestic employee that enters the United States accompanying his or her employer appears to be required immediately upon entry into the United States, to separate himself or herself from the employer for up to 90 days until an employment authorization document is applied for and issued. Under this formulation, the individual would not technically be maintaining B-1 status during the period they are awaiting EAD issuance as they would not meeting the terms of their visa (i.e. employment as a personal/domestic worker.)

In addition, initial admission for B-1 personal/domestic workers into the United States is limited to one year, with the possibility for extensions for up to one year through the filing of Form I-539 requesting an extension of stay. The validity period of an Employment Authorization Document (EAD) cannot exceed the time permitted on an individual's Form I-94. Thus the B-1 personal/domestic employee faces a never-ending series of I-539 extension applications followed by I-765 EAD renewals. Eliminating the EAD requirement would relieve USCIS, the B-1 personal/domestic employee and their employers of the paperwork burden of continued and unnecessary work authorization extensions as well as the artificial period of "non-employment" during any periods where the EAD document is not in effect.

Response: USCIS appreciates these concerns and will study this further.

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[27] 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)

[28] "(17) A nonimmigrant visitor for business (B-1) who:
(i) Is a personal or domestic servant who is accompanying or following to join an employer who seeks admission into, or is already in, the United States as a nonimmigrant defined under sections **101(a)(15)(B)**, (E), (F), (H), (I), (J), (L) or section **214(e)** of the Act. The personal or domestic servant shall have a residence abroad which he or she has no intention of abandoning and shall demonstrate at least one year's experience as a personal or domestic servant. The nonimmigrant's employer shall demonstrate that the employer/employee relationship has existed for at least one year prior to the employer's admission to the United States; or, if the employer/employee relationship existed for less than one year, that the employer has regularly employed (either y ear-round or seasonally) personal or domestic servants over a period of several years preceding the employer's admission to the United States;
(ii) Is a domestic servant of a United States citizen accompanying or following to join his or her United States citizen employer who has a permanent home or is stationed in a foreign country, and who is visiting temporarily in the United States. The employer/employee relationship shall have existed prior to the commencement of the employer's visit to the United States;"

20. Two-Year EAD for NIW Physicians

Under current USCIS policy, a two-year EAD is only available to individuals who have filed an I-485 and I-765 but are unable to adjust status because an immigrant visa number is not currently available. Under 8 CFR § 204.12, physicians who have agreed to serve in a MUA, HPSA area or with a VA facility for five years may file an I-140 petition and request an EB-2 National Interest Waiver. They may also file an I-485 concurrently with the I-140. Regulations at 8 CFR § 204.12 allow the physicians to complete the medical service with an EAD, though the I-485 may not be approved until they have completed the required five-year service. Because most of the NIW physicians have an immigrant visa number immediately available, they and their family members are not entitled to a two-year EAD under the current policy. Nevertheless, they are ineligible to adjust status until they have completed their required service.

AILA suggests that USCIS expand the two-year EAD coverage to include the physicians who have an approved I-140 NIW petition, a pending I-485, and more than one year remaining medical service to complete.

Response: Currently, applicants with an approved I-140 petition and a pending I-485 are eligible for a two-year EAD, only if the visa petition has regressed. The January 23, 2007 memo titled 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"), http://www.uscis.gov/files/pressrelease/SchneiderIntrm012307.pdf, along with the I-765 Instructions, indicate that NIW physicians must show meaningful progress every 12 months. If an NIW physician was granted a multiple year EAD, USCIS would be unable to adjudicate the meaningful progress determination which is required. USCIS will review the above proposal to see if it is feasible given our current requirements.

21. Holding Subsequent Filings in Abeyance

AILA requests that USCIS reverse its current policy that instructs adjudicators to hold subsequently filed petitions in abeyance while an initial filing is on appeal.

AILA has been informed by SCOPS that it remains Service policy that a second filing for a case that is currently on appeal will be held in abeyance pending outcome of the appeal.[29] SCOPS has indicated that this policy is in accordance with a 1989 Memorandum issued by Richard Norton, Associate Commissioner, legacy INS[30]. Review of the Norton Memorandum does not support USCIS' position.

The plain language of the Norton Memorandum only requires an adjudicator take reasonable actions to determine whether a case may already be the subject of an appeal or litigation. The Norton Memorandum states, "Adjudicators encountering cases which may already be the subject of an appeal or litigation should, before taking an action whatsoever, discuss the matter with the staff of the Administrative Appeals Unit if the matter is pending in that office or with the district or regional counsel if the matter is being considered by the Board of Immigration Appeals or in the federal courts."[31] There is absolutely no instruction in the Norton Memorandum that requires adjudicators to hold a subsequent filing in abeyance during the pendency of an appeal.

While USCIS does not require a petitioner to withdraw an appeal under its current policy, the net effect is that a petitioner can not have its subsequent filing adjudicated until the appeal is no longer pending. To require that a subsequent filing be held in abeyance during the pendency of appeal places a petitioner in the quandary of having to choose to surrender the right to appellate review of an adverse decision on a petition or application in order to receive adjudication of a subsequently-filed petition or application. These rights include but are not limited to priority date retention, ability to obtain additional H-1B time under AC21, and protection under Child Status Protection Act (CSPA).

In light of the lengthy processing times at the AAO, a petitioner or beneficiary may need to file a second application or petition to protect other rights. AILA is concerned that due to the lengthy processing times for appeals and adjudications at the Service Centers, that this policy places undue burden and harm on petitioners and beneficiaries. A basic doctrine is that every petition and application stands on its own and therefore, AILA strongly urges USCIS to review each petition on its own merits. While we understand that USCIS is concerned with consistency in adjudications, AILA believes the burdens far outweigh the benefits.

AILA requests that USCIS institute a new policy that facilitates the adjudication of a subsequently-filed matter while holding in abeyance the pending appeal, and to promptly publish such policy guidance to the public.

Response: Following the issuance of field guidance in a February 8, 1989 memorandum entitled ***"Adjudication of Petitions and Applications Which Are in Litigation or Pending Appeal"***, USCIS adopted the practice of holding duplicate or new petitions/applications in order to avoid issuing new decisions that may have been inconsistent with an earlier decision made on the same or a similar case.

The internal coordination called for in the 1989 Memorandum serves important interests in maintaining consistent adjudication and in preventing fraud and misrepresentation. If the subsequent filing presents, in essence, the exact same claim as the filing that is on appeal, deferring adjudication of the later filing conserves limited resources and safeguards against "forum shopping." These concerns are particularly weighty when the petitioner or applicant does not, in the subsequent filing, disclose the materially relevant fact of the other pending case. In other cases, the internal coordination could result in the expedited adjudication of the appeal.

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[29] AILA/SCOPS Q&A (September 17, 2008), Question 9, USCIS Answer: "USCIS does not require that the petitioner withdraw the appeal. However, if the appeal is pending, the second filing will be held in abeyance pending the outcome of the appeal. This is required for consistency on adjudications."

[30] Memorandum from Richard E. Norton, Associate Commissioner, *Adjudication of Petitions and Applications which are in Litigation or Pending Appeal* (February 8, 1989) ("Norton Memorandum").

[31] Id. at page 2.

USCIS will review our current practice and issue appropriate guidance to the field if needed.

General Processing/Procedural Issues

22. Lockbox Expansion & Bi-Specialization

a. AILA requests an update on USCIS' current plans for lock box expansion and any upcoming modifications to bi-specialization filing at the USCIS Service Centers.

b. AILA requests an update on USCIS' progress on moving forward with a regulation to remove reference to specific form filing locations so that changes in filing and processing can be done simply by modifying the associated forms and information on USCIS website.

c. AILA urges USCIS to announce to the public changes in filing locations at least 60 days in advance of the proposed change and clearly state the time for grace periods for filing at the wrong location. Over the past few years there has been a number of filing location changes and tremendous confusion caused to the public by a lack of sufficient notice. Inadvertent filing at incorrect location can cause irreparable harm as the consequences for failing to timely file the majority of benefits processing by USCIS (e.g. change of status, extension of stay, a labor certification close to the 180th day of validity) can cause an individual to lose rights to a benefit.

Response to address a, b & c: As part of our ongoing efforts USCIS plans to shift intake of naturalization applications to Lockbox facilities. The acceptance of the N-400 at the new Lockbox facilities in Phoenix and near Dallas, previously announced to begin October 14, has been delayed as testing on systems continues. A new Federal Register Notice will be published when a date for the intake of naturalization is re-established. The I-800A and I-800 Hague Adoption forms are being filed at the Chicago Lockbox effective September 25.

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.

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

AILA appreciates USCIS' expansion of the filing window for H-1B cap petitions this past fiscal year from two to five business days. AILA requests an update on any plans to further change the process for filing H petitions for the FY2010 H-1B cap period including whether USCIS anticipates implementing electronic filing in the near future.

Response: At this time there are no plans to change the H-1B filing procedures for FY10 filings. If a change should occur, notification will be provided through federal register notice, web updates, notices to community based organizations or other appropriate means. Electronic filing will not be available in the near future.

24. Update on USCIS' Transformation Program

USCIS has discussed in detail aspects of the Transformation Program highlighted in the Concept of Operations report issued on March 28, 2007, by the Transformation Program Office. In particular, USCIS discussed the agency's movement to an account based customer management approach to managing and processing benefit information including the issuance of a unique account number to applicants and representatives that will link all information about the applicant and/or representative and provide for the ability for representatives to update their information via the internet. Please provide an update regarding any progress in the development of the account based system including whether a vendor has been selected to develop the necessary technology for the program.

(To be discussed orally.)

25. Training Updates

In December 2007, USCIS announced the integration of three new state-of-the-art training facilities[32] in Dallas, Texas and Lansdowne, Virginia as well a newly restructured BASIC Training curriculum that includes new hire orientation, classroom instruction, and an on-site practicum over a nine week period.

a. Please provide AILA an update on the progress of USCIS' training initiatives after the establishment of the new training facilities and re-vamped training program.

b. Please provide copies of the course syllabus and curriculum for the newly redesigned training program.

c. Would USCIS be interested in presentations by attorneys and stakeholders as part of the training curriculum? AILA would be pleased to assist USCIS in the training process for new officers.

d. Are there any plans to open additional training centers around the country and/or to modify the new BASIC Training

[32] News Release, *USCIS Expands Immigration Officer Training Capacity*, December 5, 2007 and February 2008 USCIS Monthly Newsletter, *A Message From USCIS Director Emilio Gonzalez,* page 1.

program in the near future?

(To be discussed orally.)

26. Leadership and Staffing Updates

a. Please provide us with updates on changes in leadership and staffing that have recently occurred, or are expected to occur in the near future.

b. Please provide a current organizational chart for USCIS Headquarters, with names and titles of incumbents, as well as a listing of regional, field and sub-office addresses, leadership, and contact information.

(To be discussed orally.)

27. Website

a. At the conclusion of our spring 2008 meeting USCIS indicated it would review and analyze AILA's request that USCIS expand the number of actions that result in an email via the online status 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). Is USCIS able to update any progress on this request?

Response: USCIS continues to expand the number of actions that result in an email response via the online status account. As part of the July 2008 update to the Customer Relationship Information System (CRIS), customers now receive notices if a biometrics appointment letter is sent and if a document is returned as undeliverable. Currently, USCIS has two action codes for transfer notices in place; there are no immediate plans to increase the number of action codes relating to transfer notices.

b. Are there any other upcoming changes and/or improvements to USCIS' website in the near future?

Response: USCIS plans to continue the development of the Spanish language version of the agency's website, which is currently scheduled for launch in the second quarter of FY 2009. In addition, the agency will continue to improve the content and organization of the website, and to develop innovative strategies for communication and outreach.

A recent release of CRIS included the following improvements to the webpage regarding the processing time information:

a) A new Processing Times "Effective Date" was added to the webpage to specifically identify the date that the processing time information was calculated. This date has historically been 45 days older than the posting date reflected on the webpage and the primary source of confusion to USCIS customers.

b) The Processing Times webpage text was updated to more clearly identify how the processing time information was to be used by the customer. Specific instructions were added to the webpage.

A new release of CRIS is scheduled for mid-November and will improve the overall performance of the website, including Change of Address Online and Case Status Online.

28. Expansion of Best Practices

AILA appreciates USCIS willingness to develop e-mail access for certain types of requests at the Service Centers and National Benefit Center. AILA understands that the Texas Service Center has implemented e-mail access for individuals to inform the Service Center of long-pending I-140 petitions and I-485 adjustment of status applications. AILA would be pleased to assist USCIS in determining the efficacy of this system and urges USCIS to implement e-mail access at all the Service Centers and the National Benefits Center for discrete problem solving issues.

Response: Currently, customers can call the 1-800 number and request a *Service Request* to be sent to the Service Centers and National Benefits Center for the following services: Case Outside Normal Processing Time, Typographical Errors, Non-Delivery of a Receipt Notice, Non-Delivery of Documents, Expedites, and Change of Address. USCIS plans to provide customers with a self-service option via the web for submission of Service Requests directly to Service Centers and the National Benefits Center via the web. In 1Q10, the self-service option will be available for Outside Normal Processing Times, Typographical Errors, and Non-Delivery of a Receipt Notice. The remaining categories of Service Requests will be made available via self-service 2Q10.