



Questions and Answers

USCIS Meeting with the American Immigration Lawyers Association (AILA)

April 10, 2014

Overview

On April 10, 2014 USCIS hosted an engagement with AILA representatives. USCIS addressed questions related to I-130 adjudications, provisional waivers, and DACA among several other topics. The information below provides a review of the questions solicited by AILA and the responses provided by USCIS.

Questions and Answers

USCIS Organization

1. Have there been any leadership changes at USCIS that you would like to share with AILA? Can you provide us with a current organizational chart?

Response: USCIS would like to share the following leadership updates:

- Lori L. Scialabba, Acting Director
- Rendell L. Jones, Acting Deputy Director
- Dan Renaud, Deputy Associate Director for Field Operations
- Nick Colucci, Chief, Immigrant Investor Program Office (IPO)
- Lori Pietropaoli, Regional Director, Northeast Region, Field Operations
- Carrie Selby, Deputy Center Director, Vermont Service Center
- John Allen, Adjudications Division Chief, Service Center Operations

Nonimmigrant Petition Adjudication

2. Recent L-1B denial and Request for Evidence (RFE) rates released in response to a Freedom of Information Act request show that RFEs and denials of L-1B petitions are continuing at alarming levels. Why is the success rate for these petitions continuing to decline? Can you provide any guidance to practitioners as to what USCIS is looking for? Are there any policy considerations you

can articulate as to why employers seeking to transfer key specialized knowledge personnel are facing such challenges with L-1B petitions?

Response: The decision to issue an RFE or deny an L-1B petition is, in all instances, based on the specific evidence and facts presented in a given case; any such decision is made in accordance with the regulatory guidelines set for in DHS regulations set forth at 8 C.F.R. parts 103 and 214.2. Consistent with those guidelines, USCIS will issue an RFE in instances where the petition is not immediately approvable based on the evidence presented. Similarly, USCIS will deny an L-1B petition in cases where the petitioner has failed to meet its burden of establishing eligibility for the benefit sought.

In order to obviate the need for USCIS to issue an RFE, it would be helpful for petitioners not only to include a detailed cover letter with their petition, but also provide sufficient supporting evidence to establish eligibility. For instance, in many cases, adjudicating officers have noted that the evidence submitted does not match what is outlined in the cover letter. On a similar note, to avoid denial of an L-1B petition, a petitioner must submit sufficient probative evidence to establish, by a preponderance of the evidence, that the petition meets all applicable statutory and regulatory requirements.

I-130 Adjudications

3. In recent months, USCIS has had to ship stand-alone immediate relative I-130 petitions to different service centers to address the backlog. Where the beneficiary spouse will consular process, the bona fides of the marriage and admissibility are addressed during the consular interview. Given the nature of the relationship between the petitioner and the beneficiary and in the interests of promoting family unity, these petitions should be given high priority. What challenges in adjudicating these petitions caused the backlog?

Response: USCIS appreciates AILA's concern regarding extended processing times for Form I-130, Petition for Alien Relative, filed by U.S. citizens for their eligible immediate relatives.

USCIS is ever-mindful of the need to process a U.S. citizen's immediate relative Form I-130 petition carefully and expeditiously. The need is defined by the immigration system's goal of preserving family unity. It is for this fundamental reason that USCIS has been focused on addressing delays in the processing of these Form I-130s for several months.

The I-130 delays were the result of increased filings of certain form types as well as difficulties in hiring new staff to address these increased filings.

Last October, in an effort to expedite the adjudication of these cases, USCIS began transferring stand-alone Form I-130s filed by U.S. citizens for their immediate relatives from USCIS's National Benefits Center to its Nebraska, Texas, and California Service Centers. This shift improves USCIS's ability to adjudicate the cases in a timely manner. USCIS expects the processing of these Form I-130s to be increasingly timely in the ensuing weeks, culminating in the return to an average processing time of five months.

Entrepreneurs in Residence Initiative

4. The Entrepreneurs in Residence initiative was implemented with the goal of attracting and retaining immigrants to establish startup enterprises that promote innovation and create jobs in America. Has the initiative resulted in an increase in nonimmigrant and immigrant petitions being filed by entrepreneurs and start-ups? Can USCIS provide any information on how the goals of the program have been met?

Response: The EIR team worked collaboratively to develop the most effective solutions for USCIS. For each of its three main goals, the team produced a range of signature deliverables.

- Produced clear public materials to help entrepreneurs understand which visa categories are most appropriate for their particular circumstance.
 - Launched [Entrepreneur Pathways](#) with information and resources for nonimmigrant entrepreneurs in November 2012. In May 2013, USCIS added information for immigrant entrepreneurs.
 - Engaged the entrepreneur community:
 - February 2012 – Information Summit – NASA Research Park, CA
 - July 2012 – EIR Tactical Team Panel Discussion – Enterprise Innovation Institute, Georgia Institute of Technology, GA
 - November 2012 - Martin Trust Center for MIT Entrepreneurship, MA
 - May 2013 - University of Chicago Booth School of Business, Chicago, IL
 - Improved outreach to student entrepreneurs – ongoing
- Equipped USCIS’s workforce with tools to better adjudicate cases in today’s complex and rapidly evolving business environment.
 - Developed and delivered Startup 101 training. This training is now fully incorporated into training at the Service Centers and is a part of the BASIC curriculum.
 - Trained specialized core of immigration officers. Now, all officers handling employment-based cases receive specialized startup training.
 - Created startup resource library.
- Streamlined USCIS’s practices to better reflect the realities of startup businesses.
 - Engaged with entrepreneurs nationwide – ongoing
 - Revised Request for Evidence (RFE) templates
 - USCIS Headquarters remains in touch to assist ISOs who may have questions regarding their startup cases. Over time, inquiries for help have decreased to a point where almost no inquiries are coming in, suggesting development of confidence and knowledge base at the Service Centers.

USCIS continues to update the Pathways website, most recently with a list of interagency resources. USCIS is exploring ways to engage further with the startup community.

New Customer Satisfaction Initiative

5. On February 10, 2014, USCIS announced that it had engaged the research firm Barbaricum to conduct customer satisfaction surveys and focus groups. Could you please explain the goal and process involved in this effort? Do customers to be surveyed include attorneys?

Response: USCIS conducts regular phone and electronic surveys to measure satisfaction with our customer service efforts. Survey participants are asked to provide feedback on their experience with the National Customer Service Center (NCSC) including the IVR, Tier 1 and Tier 2, as well as our online customer service tools, such as e-Request and Case Status Online. Respondents are also asked to provide feedback on their experience at InfoPass appointments and their satisfaction with the USCIS website. Survey participants are recruited from a pool of individuals who have recently called the NCSC and made InfoPass appointments. In addition to the standard phone and e-surveys, Barbaricum conducts quarterly focus groups on USCIS' behalf, to solicit more in-depth feedback on various topics from small groups of customers and stakeholders. Recent focus group topics have included USCIS' online customer service tools, overall customer access, and language access. Participants in these focus groups have included attorneys and representatives of community based organizations, as well as English and Spanish speaking customers.

DACA Issues

6. A number of AILA members have contacted NCSC or the appropriate service center to inquire about a pending Form I-821D, Consideration of Deferred Action for Childhood Arrivals, and were told that the applications are "on hold awaiting guidance." In many cases, the DACA applicant and the attorney are not aware of any issues that would be causing USCIS to delay adjudicating the DACA request.
 - a. Are there cases on hold at the USCIS service centers that are awaiting guidance by USCIS Headquarters?

Response: Yes. For example, USCIS is aware of a number of cases that are awaiting guidance regarding how to treat certain evidence that has been submitted to satisfy the educational guidelines.

- b. What guidance related to DACA is currently under consideration by USCIS Headquarters?

See Response in "a"

- c. When will this guidance be provided to the USCIS service centers?

Response: We are aware of the delay that this lack of guidance has caused and are actively working on guidance, in consultation with the Department of Education, to inform service center adjudication. We cannot set a date where guidance will be complete but can assure that this is a top priority.

Provisional Waivers

7. We welcome the January 24, 2014 guidance on the “reason to believe” standard in provisional waiver adjudications and appreciate USCIS’s response to this pressing issue. We have a few follow-up questions:

- a. Moving forward, will officers issue RFEs when the immigration consequences of a criminal history may be not clear from the record?

Response: Officers always have the discretion to issue a Request for Evidence (RFE) if the evidence in the record raises questions or issues that may affect the officer’s decision in a particular case. RFEs are not required but an officer will issue one if warranted.

- b. Does this guidance extend to other potential grounds of inadmissibility, such as where there may be a question as to whether an applicant has previously sought to obtain an immigration benefit through fraud or misrepresentation?

Response: The current guidance does not extend to fraud or misrepresentation inadmissibility grounds. If USCIS has reason to believe that an individual has committed fraud or misrepresentation, USCIS will likely deny the Form I-601A.

- c. Will USCIS reopen on its own cases that were denied under the prior adjudication standard or will applicants be required to file a motion to reopen/reconsider in order to have their case reexamined?

Response: USCIS will reopen on its own motion cases that were denied under the prior adjudication standard unless the applicant has already received an immigrant visa.

- d. If USCIS will reopen these cases on its own, will it issue RFEs when the immigration consequences of a criminal issue are not clear from the record?

Response: Please see response to question 6a.

- e. If applicants are required to file a motion to reopen, please confirm that USCIS will accept untimely motions and whether a fee will be required.

Response: Not applicable. Please see the response to question 6c.

- f. If a fee is required, will USCIS refund the fee if the case is reopened and approved?

Response: Not applicable. Please see the response to question 6c.

Petition Revocation

8. Members have reported receiving I-140 petition revocation notices long after the petitions were initially approved which indicate that the revocation was based on an after-the-fact reweighing of the evidence, where a second officer substitutes his or her opinion for that of the first officer. While

it is recognized that INA §205 and 8 CFR §205.2 vest revocation authority in USCIS, AILA urges that the principles of “gross error” and “material error” should guide USCIS adjudicators when considering whether to revoke an approved I-140 petition. The 2004 Yates memorandum, “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,” offers persuasive arguments in favor of leaving unchallenged the approval of a petition absent fraud, material error, or material change in circumstances.¹ Would USCIS please describe the factors weighed when considering the revocation of an approved I-140, and to the extent it has not done so, incorporate the principles for readjudication outlined in the 2004 Yates memo?

Response: There are a variety of reasons why a revocation notice might be issued long after the Form I-140 petition was initially approved. These may include but are not limited to:

- An investigation is initiated into the Form I-140 petition based on new evidence that was not available at the time the Form I-140 petition was approved. For example, the beneficiary of the approved I-140 petition subsequently files a Form I-485 application to adjust status to lawful permanent residence which contains evidence that casts doubt on the work experience the beneficiary claimed in connection with the Form I-140 petition.
- During the beneficiary’s Form I-485 interview with an Immigration Services Officer, information is uncovered which casts doubt on material aspects of the Form I-140 petition. The Form I-140 petition is returned to the Service Center for reconsideration based on the new material information.
- Due to lack of visa availability and/or visa regression and the associated passage of time, a material change in circumstances may have occurred making revocation necessary.

The Yates Deference Memo referenced in AILA’s question is specific to nonimmigrant petitions, not Form I-140 immigrant petitions, and discusses the significance of prior approvals of nonimmigrant petitions in the context of subsequent determinations on extension of stay requests. AILA notes that this memo “offers persuasive arguments in favor of leaving unchallenged the approval of a petition absent fraud, material error, or material change in circumstances.”

USCIS is guided by statutory authority at section 205 of the Immigration and Nationality Act (INA), regulatory provisions at 8 C.F.R. § 205.1 and 2, and Board of Immigration Appeals (BIA) precedent decisions in determining when revocation of a petition’s approval may be warranted. Those decisions include *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), *Matter of Estime* 19 I&N Dec. 450 (BIA 1987) and *Matter of Arias*, 19 I &N Dec. 568 (BIA 1988). A USCIS officer initiates revocation if s/he can articulate that the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his or her burden of proof.

USCIS is not aware of the revocation of Form I-140 approvals being issued for “good and sufficient cause” under INA § 205 and in line with precedent decisions, which do not also involve a material error in the initial decision, a material change in circumstances related to the petition, and/or a

¹ See HQOPRD 72/11.3, April 23, 2004 (AILA InfoNet Doc. No. 04050510 (posted May 5, 2004; <http://www.aila.org/content/default.aspx?docid=10654>).

finding of fraud or material misrepresentation in relation to the petition. If you are aware of specific revocations of Form I-140 approvals where USCIS did not have “good and sufficient cause” for revocation within the meaning of INA § 205, please bring those cases to our attention.

Medical Marijuana

9. Has DOJ issued guidance to USCIS on how applicants should be treated if they have received medical marijuana in a state where it is legal to ingest, purchase, use, or sell medical marijuana?

Response: No. Notwithstanding, USCIS has consulted with DOJ and DHS on this issue. USCIS has drafted guidance, which is currently circulating through the agency’s concurrence process.

Travel During the H-1B Cap-Gap Period

10. The Q and A on Post-Completion Optional Practical Training and F-1 Status for Eligible Students under the H-1B Cap-Gap Regulations found on the USCIS website states that a student granted a cap-gap extension who elects to travel outside the United States during the cap-gap extension period, will not be able to return in F-1 status.² However, under the cap-gap regulations at 8 CFR §214.2(f)(5)(vi)(A), “the duration of status and any employment authorization ... of an F-1 student who is the beneficiary of an H-1B petition and request for change of status shall *be automatically extended* until October 1 of the fiscal year for which such H-1B visa is being requested” and under 8 CFR §214.2 (f)(13)(ii), an F-1 student who has an unexpired post-completion OPT EAD who is otherwise admissible may return to the U.S. to resume employment after a temporary absence. If the student has a valid F-1 visa stamp, a properly endorsed I-20, and an EAD card that has been automatically extended in accordance with 8 CFR §214.2(f)(5)(vi)(A) , shouldn’t the student be able to travel and return to the U.S. to resume employment during the cap-gap period in accordance with 8 CFR 214.2(f)(13)(ii)?

Response: The ability to re-enter the United States involves other DHS entities, including Customs and Border Protection, as well as the Department of State. USCIS will reach out to these other government agencies to further explore your request. In the interim, USCIS must follow the current policy as stated in the H-1B Cap-Gap website.

Transition from AFM to Policy Manual

11. USCIS recently released several new chapters to the Policy Manual (Admissibility, Waivers, and Adjustment of Status for Refugees and Asylees).
- a. On January 7, 2013, when the Citizenship and Naturalization volume was released, USCIS stated that “as content becomes available for each volume, USCIS will notify the public and invite comment on new or substantially changed policies. Did USCIS invite public comment on any of the recent policy manual releases? If not, can we assume that there were no “new or substantially changed policies” in the new chapters?

² See <http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/extension-post-completion-optional-practical-training-opt-and-f-1-status-eligible-students-under-h-1b-cap-gap-regulations>.

Response: As noted, USCIS will notify the public and invite comment on new or substantially changed policies. On March 25, USCIS published guidance on fraud and willful misrepresentation inadmissibility and waivers. USCIS is currently seeking comment on new and updated policies in these sections of the policy manual. Also, USCIS accepts and reviews comments about policy manual content at USCISPolicyManual@uscis.dhs.gov, which may be accessed by clicking the “Feedback” link of the policy manual.

b. Which chapters and/or portions of the Policy Manual will be released next? AILA believes that it is important to release Chapter 1 on General Policies and Procedures as soon as possible. This introductory section is important to set stakeholder expectations in the entire adjudications process and to foster uniformity in adjudications.

Response: The next planned releases are:

- Children Born through Assisted Reproductive Technology and Acquisition of Citizenship
- Date of Birth Changes on Certificates of Citizenship
- Travel, Employment, and Identity Documents
- Adjustment of Status Policies and Procedures
- 245(a) Adjustment
- 245(i) Adjustment
- Family-Based Adjustment
- Employment-Based Adjustment
- Special Immigrant Based (EB-4) Adjustment

USCIS is currently drafting Volume 1, General Policies and Procedures, and preparing this guidance for submission into the agency’s concurrence process.

Child Status Protection Act (CSPA) Adjudications Pending Decision in *Mayorkas v. Cuellar de Osorio*

12. On November 21, 2013, USCIS issued guidance on handling certain family-based automatic conversion and priority date retention requests pending the U.S. Supreme Court’s ruling on *Mayorkas v. Cuellar de Osorio*.³ The guidance provides that where a petitioner files an F-2B petition on behalf of a former derivative beneficiary of a previously approved F-2A petition, the original priority date will be retained if they meet the requirements of 8 CFR §204.2(a)(4) or §204.2(h)(2). In addition, under *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), a derivative beneficiary of a petition originally approved for F-2A classification is eligible to adjust status in the F-2B classification without having to file a second petition. In such cases, USCIS will accept an application for adjustment of status and may grant the application when the applicant was previously classified in the F-2A category, has a qualifying relationship to the original petitioner, is eligible for classification as the son or daughter of that petitioner, and is otherwise eligible for adjustment of status. The guidance goes on to state that USCIS will deny priority date retention requests when a petition for F-2B classification is filed by any individual other than the original petitioner. Applications for adjustment of status, for which the sole basis for eligibility is the petition for which priority date retention was requested and denied and for which visa availability is contingent upon the requested

³ See USCIS Policy Memo, “Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Pending a Supreme Court Ruling on *Mayorkas v. Cuellar de Osorio*,” published on AILA InfoNet at Doc. No. 13112251 (posted on 11/22/13).

older priority date, shall be rejected as improperly filed. Any such applications that were previously accepted as properly filed shall be held pending the U.S. Supreme Court's ruling on *Mayorkas v. Cuellar de Osorio*.

a. Please provide an update on how cases are being adjudicated pursuant to this guidance.

Response: Field offices are adjudicating Form I-485 in accordance with the November 21, 2013, Policy Memorandum. Specifically:

- Where a petitioner files an F-2B petition on behalf of a former derivative beneficiary of a previously approved F-2A petition, the original priority date will be retained if they meet the requirements of 8 CFR §204.2(a)(4) or §204.2(h)(2);
- As set forth in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), a derivative beneficiary of a petition originally approved for F-2A classification is eligible to adjust status in the F-2B classification without having to file a second petition;
- USCIS denies priority date retention requests when a petition for F-2B classification is filed by any individual other than the original petitioner;
- Applications for adjustment of status, for which the sole basis for eligibility is the petition for which priority date retention was requested and denied and for which visa availability is contingent upon the requested older priority date, are rejected as improperly filed. Any such applications that were previously accepted as properly filed are held pending the U.S. Supreme Court's ruling on *Mayorkas v. Cuellar de Osorio*.

b. How many F-2B priority retention/automatic conversion adjustment of status cases are on hold pending the U.S. Supreme Court's ruling on *Mayorkas v. Cuellar*?

Response: There are currently 39 cases on hold pending the U.S. Supreme Court's ruling on *Mayorkas v. Cuellar*.

Social Security Numbers on Benefits Applications

13. Many benefits applications ask for Social Security Numbers. Other benefits applications, such as the I-765, Application for Employment Authorization, ask for any Social Security Number the applicant has ever used. USCIS guidance on Deferred Action for Childhood Arrivals (DACA) indicates that Question 9 on Form I-765 is meant to elicit only Social Security numbers that were officially issued to the applicant by the Social Security Administration. Does this guidance extend to applications outside of the DACA context?

Response: The guidance referenced in question 12 does not extend to applications outside of the DACA context. If a USCIS form requests any SSN that the individual ever used, the information provided on the form should include all SSN numbers used by the individual whether or not the numbers were issued to the individual by the Social Security Administration.

American Competitiveness in the 21st Century Act (AC21)

14. During the September 26, 2006 AILA meeting with USCIS, AILA advocated for a broader interpretation of Section 104(c) of AC21, to permit either spouse in H-1B status to benefit from the “One-Time Protection Under Per Country Ceiling” provision.⁴ Specifically, if both spouses are in H-1B status and either spouse is the principal beneficiary of an approved I-140 petition but, due to visa retrogression, the permanent residence application cannot move forward, both should be eligible to apply for H-1B extensions beyond the general six-year limitation under INA §214(g)(4). To date, the Service Centers and the AAO continue to restrict this benefit to the principal beneficiary of the immigrant visa petition, notwithstanding the fact that the spouse is also a beneficiary of the I-140 petition. As a result of this restrictive interpretation, many employers are forced to file PERM applications and employment-based visa petitions solely for the purpose of preserving H-1B eligibility for derivative beneficiary spouses. AC21 was an ameliorative statute designed to address the problems resulting from the disruption to American businesses from delays in H-1B processing, the unavailability of H-1B visas, and the employment-based immigrant visa backlogs. Given the fact that a strong case can be made to support the argument that the term “beneficiary” applies to all beneficiaries, whether principal or derivative, AC21 §104(c) should be interpreted liberally to apply equally to both H-1B spouses. Can you please explain the policy considerations that have directed the Service to impose a more restrictive interpretation of this statute?

Response: USCIS is reviewing this issue as it drafts the AC21 Notice of Proposed Rulemaking (AC21 NPRM). Please note that once drafting is complete, the AC21 NPRM will be subject to various levels of clearance before it can be published. When the AC21 NPRM is published, we encourage AILA to review and provide comments. As AILA states, our current policy allows an exemption under AC21 section 104(c) only for the qualified principal beneficiary of the approved I-140 petition, not for a derivative beneficiary. We interpret AC21 section 104(c), which only permits extension of H-1B status for “any alien who -- (1) is the beneficiary of a petition filed under section 204(a) of [the INA] for a preference status under paragraph (1), (2), or (3) of section 203(b) of [the INA] ...” Until the AC21 NPRM is finalized, the service centers will continue with the current interpretation of AC21 section 104(c).

⁴ See <http://www.aila.org/content/default.aspx?docid=21091>, published on AILA InfoNet at Doc. No. 06112165 (posted 11/21/06).