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INTRODUCTION

This paper provides recommendations on steps that should be taken to improve the quality and integrity of immigration processes and policies related to the adjudication of applications for benefits by agencies involved in the administration of the immigration and nationality laws. It also highlights areas of concern with respect to the integrity and use of immigration status information in the enforcement realm as well as issues related to employment authorization documentation. This paper is not meant to be a comprehensive survey, but rather, a document that flags priority concerns for which solutions may be easily reached and which could have an overall beneficial impact on immigration processing.

I. GENERAL PRINCIPLES

It is critical for the new administration to reaffirm adherence to the principles of transparency, consistency and balance in the administration and enforcement of our immigration laws, and to implement policies that promote these principles. Moreover, the new administration needs to reaffirm the mission of the USCIS as the service branch of the Department of Homeland Security.

A. POLICY TRANSPARENCY

The agencies and departments that are charged with the administration and enforcement of the immigration laws must immediately become more open and share with the public to a greater extent interpretive, policy, guidance and training materials that have been developed and which are relied upon by employees of the agencies when administering and enforcing the immigration laws. Examples of such materials include:

- The visa policy cables of the Department of State (known as “ALDAC” cables), as well as advisory opinion (AO) messages transmitted from the Visa Office to consular posts abroad in response to requests for guidance on specific cases, and which, when applied beyond the case for which the AO was issued, take on the aura of policy, but remain shielded from public view. The number of ALDAC and other field directives that the State Department has made available to the public has declined notably over the last five or more years, and it appears that more guidance is being disseminated by the State Department through less formal channels, such as the advisory opinion system.
- Adjudication and operational policy guidance and instructions of the USCIS, which can be in the form of policy memoranda, revisions to the Adjudicator’s Field Manual (AFM), Standard Operating Procedure (SOP) directives, as well as formal and less formalized training programs and training materials afforded to officers that have a direct influence and bearing on how USCIS employees handle matters. While the frequency with which the USCIS makes available to the public memoranda and updates to the AFM has remained relatively constant, and are posted on the USCIS website, adjudication patterns and practice that is at

variance with publicly available guidance is giving rise to increasing concerns that there is a second body of guidance that is shielded from public view, and which informs USCIS employees in the discharge of their duties and responsibilities, and which is conveyed during initial and ongoing training, through dissemination of non-precedent (and non-binding) decisions of the Administrative Appeals Office, an administrative review body within the USCIS, and through other communication channels.

- Adjudication and operational policy guidance and instructions of the CBP, which are in the form of policy memoranda known by the term “Muster,” as well as the Inspector’s Field Manual (IFM). The CBP has resisted publication of “Musters,” including those which provide guidance to CBP inspectors at ports of entry with respect to the processing and adjudication of applications for admission in visa categories for which an adjudication of eligibility must be performed by a CBP officer, as well as the IFM. The CBP released a copy of the IFM in response to a FOIA request that was severely redacted.

Required Action:

Transparency is promoted by open dissemination of key policy, interpretive, guidance, operational and training materials. Dissemination must be through several media, not the least of which is prominent and accessible placement on agency websites, as well as by direct notification to “stakeholder” organizations, community-based and non-governmental organizations, and other interested parties.

Increased reliance on promulgation of information on agency websites compels far greater attention to the design of websites and improvements in search and retrieval functions. The redesign of the USCIS website in 2006 is an example of a process that was ill-conceived and poorly launched. To date, for example, there is no comprehensive directory of key USCIS personnel at the HQ, regional, or field office level, nor is there even a listing of the address and contact information for USCIS Headquarters.

B. ADJUDICATION CONSISTENCY

Consistency in adjudication of applications for benefits and other relief is wanting. It is not unusual for substantially similar applications submitted to the USCIS to have different outcomes, even where the applications are adjudicated by the same USCIS office. More pronounced differences are encountered when substantially similar applications are adjudicated by different USCIS offices. Similar differences in outcome are seen in CBP adjudication of applications for admission under the TN classification presented at different times at the same port of entry, or are presented at different ports of entry. Finally, lack of consistency in the adjudication of visa applications by U.S. consulates overseas is seen. Inconsistency in adjudications undermines the integrity of the system and the public’s confidence in it. In the eyes of the public, the process can appear random, where the outcome of even the best and well-developed application cannot be predicted. When there is no certainty of success with well-prepared

applications that meet all statutory and regulatory criteria, the apparent randomness encourages applicants to “just try it” and to submit poorly prepared applications that may not even meet all regulatory requirements.

Required Action:

Agencies charged with administering benefits programs must redouble efforts to train adjudicators, to develop training materials that clearly and uniformly describe the immigration law and the policies and procedures to be applied in adjudicating applications for benefits, and to provide supervision and oversight of adjudications and adjudicators. There needs to be greater emphasis on the burden of proof for most benefits applications -- preponderance of the evidence -- and the “culture of no” needs to be eradicated.

C. BENEFITS AND ENFORCEMENT BALANCE

Steps need to be taken to moderate strict and rigid application of rules and requirement that will result in undue hardships and injustice, from the development of policies to mitigate the three- and ten-year bars for unlawful presence in INA Section 212(a)(9)(B) applied to aliens who innocently overstay their visas, to the development of policies that encourage adjudicators to forgive typographical errors and other simple mistakes in the processing of applications and benefits that now lead to denials with attendant devastating consequences -- mistakes such as submitting an application to the wrong address, or failing to include family members when a temporary worker or student applies to extend his or her stay. A balance needs to be struck in the application of prosecutorial discretion, so that individuals who are eligible for immigration benefits -- like permanent residence -- but, who have minor or technical immigration violations, are permitted to see their applications to the end, without fear of arrest, detention, and the prospect of a lengthy process in immigration court. End policies that turn aliens, and those who employ aliens, who are trying to comply, into violators.

Required Action:

Affirm once again the place of prosecutorial discretion and the principles of prosecutorial discretion embodied in the Doris Meissner memorandum. HQOPP 50/4 Memorandum “Exercising Prosecutorial Discretion” (Nov 17, 2000), affirmed by Julie Myers, ICE Assistant Secretary in a Memorandum “Prosecutorial and Custody Discretion” (Nov 7, 2007). Develop management systems that reinforce the place of prosecutorial discretion at the field and operational level. Develop policies and regulations that incorporate the concept of intent into areas of the law that have been considered strict liability.

D. USCIS CUSTOMER SERVICE FUNCTION IMPROVEMENTS

USCIS has restricted access to all offices where petitions and applications are adjudicated. Most petitions and applications are filed by mail and decided at Service

Centers with no public access. Adjudicators at Field and District Offices decide naturalization and immediate relative (spouse) petitions, and some employment-based applications referred by the Service Centers. The public can no longer go to the Field and District Offices without first navigating through a call center (the National Customer Service Center) operated by contractors, and then (if the call center did not resolve the issue) an online appointment system besieged with problems.

Applicants or potential applicants for immigration benefits simply cannot reach trained and informed USCIS employees to get answers to basic questions regarding eligibility to file applications, or to learn the status of applications once filed.

Beginning in 2003, all inquiries must be made to the National Customer Service Center (NCSC) through a centralized toll-free number. The NCSC is staffed by contractors who are not trained in immigration law and procedure. They do not have access to USCIS databases (including CLAIMS III) to determine the status of an application or to make corrections to an application. The contractors rely on prepared scripts and key-word searches when speaking with callers regarding possible eligibility to file applications or how applications are processed. There are USCIS employees available at other sites (not co-located with the contractors) to answer complex questions, but contractors are restricted from “escalating” calls to these USCIS employees, and are unable to directly contact USCIS Service Centers or Field Offices to obtain information for callers.

Customers who file applications with the USCIS Service Centers receive receipts that instruct customers to check with the NCSC if the case has not been processed within timeframes published on the USCIS website, and the online case status page of the USCIS website advises customers: “If the receipt date shown on your receipt notice is prior to the processing date shown below, you may call USCIS Customer Service at 1-800-375-5283.” It appears from information provided to customers by contractors at the call centers, the contractors have a different list of processing times not available to the public, and are forbidden to contact the Service Center or Field Offices to make an inquiry about the specific case until the date on the unpublished NCSC list has passed. Once that date has passed, the NCSC may contact the Service Center or Field Office, and the applicant or petitioner must wait 45 days for a response. If no response is received within 45 days, or the response is unhelpful, the applicant is instructed to call back the NCSC, or the customer may attempt to make an appointment at a local USCIS Field Office. Thus months go by before a petitioner or applicant has the possibility of learning why his or her case has been delayed.

Access to USCIS Field Offices (i.e., local USCIS offices) to make inquiries is controlled through the “InfoPass” system, a web-based scheduler. Generally appointments may not be made through the InfoPass system unless the customer has first called NCSC and received a reference number from the call. (As noted above, NCSC contractors frequently refuse to process a request based on non-public processing times, so customers cannot make InfoPass appointments). A customer who does not have web access must go to a public library, or to a USCIS kiosk, where they are available.¹ Appointment backlogs at

¹ See <http://lists.webjunction.org/wjlists/publib/2005-June/092475.html> for a description of the challenges

busy USCIS offices are measured in weeks, when appointments are available. USCIS offices do not have consistent procedures to handle emergency appointments. There may be another Field Office with available appointments nearby, but offices will only accept inquiries from individuals residing within their jurisdictions. As noted by the USCIS Ombudsman in a 2004 recommendation to USCIS Director, “Rather than improving customer service, InfoPass – when implemented without adequate policy guidance – further erodes public trust in the immigration system.”² In sum, the NCSC and InfoPass, both intended to enhance customer service, have had the unintended consequence of making it virtually impossible to obtain accurate information on the status of an application pending with USCIS, or to reach USCIS in an emergency.

Required Action:

Restructure the National Customer Service Center so that it is staffed or directly supervised by onsite USCIS employees with authority to access USCIS records and access to key information necessary to not only inform the caller of the status of a pending petition or application, but also to resolve questions including possible processing mistakes. Contractors’ responsibilities should be limited to non-case-specific service requests, such as requests for forms.

Until NCSC can be staffed by USCIS employees, the NCSC instructions must be consistent with the information posted on uscis.gov, and NCSC contractors must be authorized to contact the adjudicating offices when uscis.gov advises the public to contact NCSC.

The processing time information on uscis.gov should be accurate and should show the actual types of adjudications processed at each Service Center. Current postings are based on data that is 45 days old, and show “processing times” for applications that are not processed at the particular Service Center.

All Field Offices must have procedures for emergency, walk-in appointments. Each field office must have a kiosk or other computer available through which customers can make appointments.

Customers should be allowed to make InfoPass appointments at Field Offices without first contacting NCSC. Further, since all USCIS Field Offices have access to CLAIMS, applicants should be able to make an appointment at any office to obtain information.

faced by public libraries in trying to accommodate individuals attempting to make InfoPass appointments.

² http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_12_InfoPass_11-29-04.pdf

II. AREAS OF SPECIFIC CONCERN

A. GENERAL USCIS PROCESSING AND ADJUDICATION

1. Suspend Authority of USCIS Examiners to Deny Petitions and Applications Without Notice

Under USCIS regulations and forms instructions, where a petitioner or applicant submits a petition or application that lacks sufficient evidence to permit adjudication, or which lacks certain required evidence, known as “initial evidence,” a USCIS adjudicator is authorized to request further evidence (RFE), to issue a Notice of Intention to Deny (NOID), or to deny the petition or application without further notice. (See 8 C.F.R. § 103.2(b)(8).) The stated purpose of the USCIS rule is to enhance processing efficiency by permitting the speedy denial of applications and petitions that are without merit. (See <http://www.uscis.gov/files/pressrelease/RFEFinalRule060107.pdf>; <http://www.uscis.gov/files/pressrelease/RFE021605.pdf>.)

USCIS has just issued a National Production Status report showing processing times are 12.8 months for Immigrant Petitions for Alien Workers, and 7.2 months for Immigrant Petitions for Alien Relatives. <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=97e19c337879d110VgnVCM1000004718190aRCRD&vgnextchannel=54519c7755cb9010VgnVCM10000045f3d6a1RCRD>

When petitioners must wait so many months for an initial review of their documents, they should not face summary denial, which in many cases also means failure to establish a priority date for future immigration. Further, anecdotal information raises concerns that the USCIS is using the authority to deny without RFE or NOID as a “backlog reduction” mechanism, and petitions and applications, most frequently employment-based I-140 permanent residence petitions, are being improperly denied as examiners are under pressure from managers to meet processing goals, notwithstanding guidance that directs that denial without RFE or NOID is to be “exercised judiciously.” Further compounding the problem and leading to denials without RFE or NOID is confusion over what constitutes “initial evidence,” whether “initial evidence” is merely the minimum evidence to be included with any petition or application, or whether considering what constitutes “initial evidence” permits an examiner to evaluate whether the evidence submitted satisfies a petitioner’s or applicant’s burdens of proof and persuasion. The combination of pressure to reach processing goals and lack of understanding of the concept of “initial evidence” leads to improper denials, which then results in hardship on the petitioner or applicant, the petitioner or applicant’s employer, and an additional drain on USCIS resources processing appeals and motions to reopen and reconsider.

Required Action:

Issue a memorandum to Service Centers suspending authority of USCIS examiners to deny petitions or applications without first issuing an RFE or NOID. Do not reinstate

this authority unless and until USCIS is meeting reasonable processing times of 90 days or less for petitions; a full review of guidance and training materials is conducted, which review should include input from stakeholders; and clarifying guidance is promulgated that more precisely defines key terms and more clearly circumscribes the conditions under which a USCIS examiner can deny a petition or application without RFE or NOID.

2. Suspend the Policy to Deny Concurrently-Filed I-485 Applications to Register Permanent Residence or Adjust Status Where the Related I-140 Immigrant Visa Petition is Denied

The legacy INS established a process in 2002 to permit the concurrent filing of an employment-based I-140 visa petition with an I-485 Application to Register Permanent Residence or Adjust Status where there is a visa number available to the alien beneficiary of the I-140 visa petition. (8 C.F.R. § 245.2(a)(2)(i)(B); 67 Fed. Reg. 49561 (July 31, 2002)). Aliens who are applicants for adjustment of status under INA § 245 are eligible for employment authorization under 8 C.F.R. § 274a.12(c)(9) for the period of time the I-485 application for adjustment of status is pending. The USCIS has continued the process, which promotes efficiency as USCIS need only handle a file once.

In 2003, legacy INS issued a memorandum directing USCIS to deny a pending I-485, and to revoke any employment authorization granted in conjunction with the pending I-485, when the concurrently-filed I-140 Immigrant Petition for Alien Worker is denied. (See, William R. Yates, Deputy Executive Associate Commissioner, INS, “Procedures for concurrently filed family-based or employment-based Form I-485 when the underlying visa petition is denied,” HQADN 70/23.1, February 28, 2003 [Not published on USCIS website, but available on AILA InfoNet at Doc. No.: 03030644; <http://www.aila.org/content/default.aspx?docid=16878>].) Denial of the I-485, and employment authorization, is directed notwithstanding any review or appeal rights that the I-140 petitioner may have and may exercise.

The result is that an alien who is an applicant for adjustment of status pursuant to INA § 245, and whose I-140 is improvidently denied, will suffer denial of the I-485 application to adjust status, will suffer revocation of any employment authorization granted in conjunction with the I-485, and if the alien does not maintain a nonimmigrant status (limited to H-1B or L-1 status), will be rendered in violation of immigration status, will be amenable to removal, and will begin to accrue unlawful presence under INA § 212(a)(9). Moreover, spouses and children, who have I-485 applications for permanent residence status pending as derivative beneficiaries, will also have their I-485 applications denied, will have their employment authorization revoked, will be rendered in violation of immigrant status, will be amenable to removal, and will begin to accrue unlawful presence. Where the I-140 denial is reversed on appeal, the USCIS is authorized to reopen and reinstate the denied I-485 and employment authorization. However, processing of an I-140 appeal by the Administrative Appeals Office of the USCIS can take up to 18 months. During that time, the alien, and any spouse or children, are not entitled to employment authorization, can be the subject of removal proceedings, and are accruing unlawful presence.

The problem is exacerbated because of the uncertainty and unpredictability of USCIS adjudications. The USCIS has a policy that permits the denial of an I-140 petition without prior notice (RFE or NOID). Rapid expansion of the USCIS adjudications staff and inconsistent, and often contradictory, policy directives with respect to adjudication standards have resulted in I-140 denials that require supervisory or administrative appellate review. Aliens whose I-140 petitions are improvidently denied are exposed to serious hardship, including potential loss of employment authorization, and unlawful status. Employers face the difficult choice of losing needed employees, or facing sanctions for continuing to employ unauthorized aliens while review of the improper denial works its way through the system.

Required Action:

Withdraw the memorandum directing the automatic denial of an I-485 application, and revocation of employment authorization, when the underlying I-140 petition is denied, and direct that the I-485 application and related employment authorization is to continue during the period of time that the I-140 denial is under review.

3. Suspend the Policy Limiting Rescheduling of Permanent Residence Interviews to “Compelling Extenuating Circumstance” and Permitting Denial of Applications for Permanent Residence and Other Benefits For Failure to Appear for Benefits Interview

An October 2006 USCIS Memorandum by Michael Aytes, Associate Director of Domestic Operations, “Case Management Timelines,” (<http://www.uscis.gov/files/pressrelease/casemgmt.pdf>) directs USCIS offices not to grant requests to reschedule interviews other than in instances of “compelling extenuating circumstances.” The processing convenience of limiting interview postponements to compelling extenuating circumstances is often outweighed by the needs of petitioners, beneficiaries, and applicants, and their counsel. In some USCIS offices, continuances are routinely disallowed, including continuances based on unforeseen business and personal circumstances for the parties, and requests for rescheduling by counsel due to unavoidable conflicts. Where parties do not appear for interviews, the USCIS exercises its authority under the memorandum to deny the petitions and applications which were the subject of the interview. Denials frequently leave aliens in violation of status, subject to removal, unable to retain employment authorization, and risking accrual of unlawful presence. The parties’ recourse is to appeal or request reopening, which is an added administrative burden for the USCIS, and can be very costly for the parties in terms of filing fees, loss of employment, and other costs.

Required Action:

Withdraw the memorandum directing denial of requests to reschedule interviews other than for “compelling extenuating circumstances,” and institute a policy that is applied equally in all USCIS offices that returns scheduling flexibility to the interview process

and which allows a party or a party's counsel to be granted a continuance of an interview for good cause shown.

4. Revise USCIS Interpretation of INA § 245(k) Relief From the Bar to Adjustment of Status Under INA § 245(c)(8)

The USCIS has not issued regulations implementing INA § 245(k), which was enacted in 1998 as part of an appropriations bill. In the absence of regulations, USCIS has adopted an interpretation of INA § 245(k) that can result in the unnecessary interruption of employment for aliens in the final stages of adjustment of status to permanent residence under INA § 245, or in the denial of adjustment of status. These outcomes are contrary to congressional intent. ([http://www.uscis.gov/files/nativedocuments/245\(k\)_14Jul08.pdf](http://www.uscis.gov/files/nativedocuments/245(k)_14Jul08.pdf).)

In general, INA § 245(a) allows an admissible alien who was inspected and admitted or paroled into the United States to apply for permanent resident status from within the United States (“adjustment of status”) if the alien is the beneficiary of an approved immigrant visa petition and has an immigrant visa number immediately available. INA § 245(c) establishes eight bars to adjustment of status under INA § 245(a), fundamentally requiring an applicant for adjustment of status who is not the spouse, parent, or child of a U.S. citizen to have continuously maintained a nonimmigrant status and not to have engaged in unauthorized employment up to the date of filing of the application for adjustment of status under INA § 245.

Congress recognized the difficulty of maintaining nonimmigrant status in the extremely complex immigration law, particularly in light of agency delays. For certain employment-based adjustment applicants, INA § 245(k) grants limited relief for status violators. INA § 245(k) expressly allows adjustment:

“... notwithstanding subsection (c)(2), (c)(7) and (c)(8) of this section, if –

- (1) the alien, on the date of filing an application for adjustment is present in the United States pursuant to a lawful admission;
- (2) the alien subsequent to such lawful admission has not, for an aggregate period exceeding 180 days –
 - (A) failed to maintain, continuously, a lawful status;
 - (B) engaged in unauthorized employment; or
 - (C) otherwise violated the terms and conditions of the alien’s admission.”

Under INA § 245(k), an employment-based adjustment applicant could still be permitted to adjust status to permanent residence under INA § 245(a) notwithstanding a status violation, including unauthorized employment, so long as the alien’s status violation or unauthorized employment did not exceed 180 days duration, counted from the date of the alien’s last admission to the United States in a nonimmigrant classification to the date of filing of the application for adjustment of status.

Clearly, under the terms of INA § 245(k), the filing of the application for adjustment of status “stops the clock” counting days of status violation and days of unauthorized

employment. The statute does not merely allow filing of the adjustment application, which might be interpreted to allow the agency to consider behavior after the filing of the application. Rather, the statute states the alien “may adjust status pursuant to subsection (a).”

Nevertheless, USCIS guidance to adjudicators states that filing an application to adjust status does not stop the 180-day clock on employment authorization. The guidance confirms that the counting of time out of status begins on the first day the alien falls out of status and ends on the date the alien files for adjustment of status. The bars to adjustment under INA § 245(a) for failure to maintain status, and for unauthorized employment fall under INA § 245(c)(2), (7), and (8). As each of these provisions is expressly waived in the same phrase in INA § 245(k), there is no basis for distinguishing between “clock-stopping” for unauthorized employment and maintenance of status.

The USCIS guidance defeats efficient processing of adjustments of status and results in numerous Requests for Evidence demanding documentation of activity after the date of filing and prior to adjudication, including multiple requests in a single application. With increasing backlogs, public policy is not served by asking applicants to document employment dates, dates of validity of employment authorization documents, and nonimmigrant (H or L) status after filing an adjustment. Service Centers frequently do not process employment authorization applications in a timely manner, or even within 90 days as required by regulation, and employment cards are issued with validity dates from the date of approval rather than the expiration of the prior document so that applicants inadvertently have gaps in employment authorization.

Employers are put in the untenable position of having to terminate employees in the final stage of adjustment to permanent residence even if an application to extend employment authorization has been filed, and then may discover when the employment document is issued that the gap has been resolved. Adjustment applicants face denial of their long-pending applications, and possible removal from the U.S.

The restrictive USCIS interpretation, combined with delays in adjudicating employment authorization applications, converts lawful workers into unauthorized workers.

Required Action:

Issue a memorandum to the field directing that pursuant to INA § 245(k), an I-485 adjustment of status application should not be denied based on either failure to maintain status or unauthorized employment after the date of filing.

5. Extend “Grace Periods” to Depart the U.S. After the End of Nonimmigrant Status for Nonimmigrant Workers in E-1, E-2, E-3, H-1B, H-1B1, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q, R, TN and Their Dependents

Individuals admitted in nonimmigrant status for specific employment need a reasonable period of time to conclude their affairs and depart in an orderly fashion after expiration of

the period of authorized employment, performance, training, or vocational activity. Current regulations technically require individuals to leave by midnight the day of expiration of the I-94, or by midnight the day the employment or activity concludes, even though the period of admission noted on the alien's I-94 extends past the date that the employment or activity concludes. For example, under current regulations, an individual whose authorized employment is unexpectedly terminated on a Tuesday at 5 pm must completely pack his or her home and depart the U.S. with all family members by midnight that same Tuesday night. This is an untenable and unreasonable requirement. The proposed H-2A regulations recognize this problem and have included a 30 day period of authorized stay after the H-2A employment period expires. A similar regulatory change is needed in each nonimmigrant category that balances the requirement that individuals timely depart after concluding the purpose of their admission with the needs of the individuals to responsibly conclude their financial and personal obligations in the U.S. Nonimmigrants whose total periods of employment may be authorized for more than five years should be allowed 60 days to depart from the U.S. Those with potential authorized employment up to five years should have 30 days to depart.

Required Action:

Amend the relevant subsections of 8 C.F.R. § 214.2 as follows:

60 days for E-1, E-2, H-1B, L-1, O-1, O-2, P-1, R

An alien lawfully admitted in [] status whose [] admission period has ended, or whose [purpose for admission as set forth by the status, e.g., employment, investment, performance, etc.] has ended, will be allowed an additional 60 day period to prepare for departure from the U.S., or in which to file, or have filed on the alien's behalf, a petition or application to extend or change status. This provision also applies to dependent family members of aliens otherwise eligible for the additional period.

30 days for E-3, H-1B1, H-2B, H-3, P-2, P-3, O, TN

An alien lawfully admitted in [] status whose [] admission period has ended, or whose [purpose for admission as set forth by the status, e.g., employment, performance, training, etc.] has ended, will be allowed an additional 30 day period to prepare for departure from the U.S., or in which to file, or have filed on the alien's behalf, a petition or application to extend or change status. This provision also applies to dependent family members of aliens otherwise eligible for the additional period.

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

On June 1, 1999, legacy INS issued a regulation which, among other things, relieved H and L nonimmigrants with pending applications for adjustment of status from the

requirement of applying for advance parole before departing the United States.³ In the supplementary information to the regulation, the Service stated that, in addition to the H and L nonimmigrant classifications, it was considering an expansion of the dual intent concept to cover other long-term nonimmigrants. The Service specifically noted that while it had traditionally deemed an application for adjustment of status as evidence in determining whether an alien had abandoned nonimmigrant intent, INA § 214(b) “does not...require the Service to hold this position as an absolute rule.”⁴

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

The very basis of the E visa category results from treaties entered into between the United States and certain treaty countries, which the Department of State’s Foreign Affairs Manual (FAM) states were negotiated to “enhance or facilitate economic and commercial interaction between the United States and the treaty country.”⁵ By the very nature of their employment, E-1 and E-2 visa holders are often required to travel frequently outside the United States. When an I-485 is filed for such a person, it is often necessary to request expedited processing of the accompanying Advance Parole application, which disrupts USCIS processing and requires significant USCIS resources to adjudicate.

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

An applicant for an E visa need not establish intent to proceed to the United States for a specific temporary period of time; nor does an applicant for an E visa need to have a residence in a foreign country which the applicant does not intend to abandon. The alien may sell his or her residence and move all household effects to the U.S. The alien’s expression of an unequivocal intent to return when the E status ends is normally sufficient, in the absence of specific indications of evidence that the alien’s intent is to the contrary.⁶

Likewise, an applicant for an E-3 visa is not required to maintain a residence in a foreign country.⁷

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

³ 64 Fed. Reg. 29208 (June 1, 1999)

⁴ *Id.* at 29209.

⁵ 9 FAM 41.51 N1(a).

⁶ 9 FAM 41.51 N. 15.

⁷ 9 FAM 41.51 N. 16-6.

The advance parole requirement should be eliminated for E nonimmigrants. The rules are the same for E-3 nonimmigrants, where the standard for determining temporary entry is precisely the same as the standard applied to E-1s and E-2s.

b. O-1 and P-1 Nonimmigrant Visa Categories

For similar reasons, the advance parole requirement should be eliminated for O-1 and P-1 nonimmigrants seeking to adjust status. The INA does not require an applicant for an O-1 or P-1 visa to have a residence abroad which he or she has no intention of abandoning, nor does it address the issue of the temporary stay of O-1 or P-1 nonimmigrants. By definition, foreign nationals in O-1 status are extraordinary achievers at the top of their fields and therefore, tend to travel frequently to attend international conference and meetings. Similarly, P-1 athletes travel abroad frequently for international athletic competitions. As in the case of E visa holders, the current rule only increases the number of Advance Parole expedite requests, which by their ad hoc nature disrupt Service processing and utilize significant Service resources.

Currently 8 C.F.R. § 245.2(a)(4)(C) reads as follows:

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

Required Action:

Make the following regulatory change to 8 C.F.R. § 245.2(a)(4)(C):

(C) The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceeding and who is in lawful H-1, L-1, E-1, E-2, E-3, O-1 or P-1 status shall not be deemed an abandonment of the application if, upon returning to this country, the alien

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

B. FAMILY-BASED IMMIGRATION PROCESSING AND ADJUDICATION

1. Promote Family Unity by Permitting Family Priority Date Retention Across Family Preference Classifications

Family unity is a cornerstone of the U.S. immigration law and policy. However, annual quota limitations in several family-based preference categories and significant processing delays can cause qualifying alien family members to lose the opportunity to immigrate because family situations change. The Immigration and Nationality Act lists specific family relationships that qualify family members to immigrate to the U.S. through the family preference categories. These include spouses and unmarried children of permanent residents; and spouses, children whether married or not, parents, and siblings of U.S. citizens. When an immigrant petition for alien relative is approved, the initial filing date of the petition becomes the priority date for the beneficiary in a specific family preference classification. Where family circumstances change, new petitions must be filed, the priority date is lost, and the family member “goes to the back of the line” and re-starts the entire immigration process.

For example, the second family-based immigration category allows permanent residents to petition for unmarried adult sons and daughters. As a result of the annual quota, this category has a waiting time of 9 years or more before immigration is possible. If the adult son or daughter marries before the sponsoring parent naturalizes, the petition becomes void. When the permanent resident naturalizes, he or she may petition for the married child again in the third preference family category with an approximate 8-year waiting time, but none of the time waiting in the second preference queue counts.

In another example, if a married child has been waiting in the queue for many years and the sponsoring parent dies, the surviving parent must file a new petition and none of the years waiting under the first parent's petition count.

By contrast, in the employment preference system, once a petition is approved under the first, second, or third preference categories, the priority date of the first approved petition applies to any subsequently filed petition. No such provision exists in the family preference categories.

Required Action:

Amend the regulations by adding the following:

Retention of INA § 203(a) priority date – A petition approved on behalf of an alien under INA § 203(a)(1)(2)(3) or (4) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under INA § 203(a) for which the alien may qualify. In the event that the alien is the beneficiary of multiple petitions under INA § 203(a), the alien shall be entitled to the earliest priority date.

2. Clarify and Streamline Humanitarian Reinstatement of Relative Visa Petitions

INA § 205 provides for revocation of approval of petitions for “good and sufficient cause.” The implementing regulations provide that a Petition for Alien Relative (I-130) is automatically revoked if the petitioning relative dies before the beneficiary is granted adjustment of status or comes to the U.S. with an immigrant visa, unless USCIS determines that it should not be revoked for humanitarian reasons. 8 C.F.R. § 205.1(a)(3)(i). The principal beneficiary must request reinstatement and must provide an affidavit of support (Form I-864) by a qualifying relative. 8 C.F.R. § 205.1(a)(3)(i)(C)(2).

While reinstatement of relative petitions is now a real option, as long as the I-130 is approved and there is a close family member qualified to file a new I-864, the problem is that it is difficult to find which government agency or office has jurisdiction over the reinstatement request and to then obtain timely adjudication of the reinstatement request. The necessity for humanitarian reinstatement only occurs as a result of a family tragedy interrupting the immigration process, and yet it can take years for the beneficiary to be issued an immigrant visa, or adjusted to permanent resident status. The immigration file in these matters may be at a consular post, or at a USCIS Service Center or Field Office. USCIS has provided conflicting information on where and how to file reinstatement requests.⁸

⁸ AILA Liaison has been told various courses of action:

(i) 2002 CSC Liaison minutes say file with service center that adjudicated original petition (posted 11/5/2002, AILA Doc # 02110531).

(ii) 2003 TSC Liaison minutes say file where case approved (posted 11/25/03, AILA Doc # 03112544).

(iii) 2006 CSC conference handbook says that CSC will follow AFM, which means that service center jurisdiction exists based on place of residence of the deceased petitioner.

(iv) 2007 VSC Liaison minutes say file to USCIS office where the I-130 was filed or transferred (posted 10/5/07, AILA Doc # 07100261).

Required Action:

USCIS must clarify procedures regarding where to file requests for reinstatement, and must accept requests when filed. USCIS and the Department of State must coordinate a file return procedure through the National Visa Center and must promptly advise the public, all USCIS offices, and consular posts of the procedures through updating the USCIS website and adjudications manual, and the DOS Foreign Affairs Manual. Procedures must include receipting the humanitarian reinstatement requests so that USCIS, DOS, the alien and the alien's attorney have a way to identify and track the case. USCIS must allocate sufficient resources so that surviving family members do not have to suffer long delays in adjudication of their requests for humanitarian reinstatement.

3. Protect Alien Widows by Implementing the Holding in *Freeman v. Gonzalez*, 444 F.3d 1031 (9th Cir. 2006) Nationwide

The traditional view has been that if a Form I-130 visa petitioner dies before USCIS acts on the Form I-130, USCIS must deny the Form I-130. It has been the long-standing view of the legacy INS, adopted by the USCIS, that a person who has been married is no longer legally a “spouse” once the other spouse has died, and, consequently, is not eligible for permanent residence based upon that spousal relationship. *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985); *Matter of Varela*, 13 I&N Dec. 453 (BIA 1970). This interpretation, the “Widow’s Penalty,” results in the denial of permanent residence to widows and widowers of U.S. citizens where the death of the American spouse occurred before lengthy administrative visa processing could be completed. Examples include the widow of a man who died while trying to rescue two teen-agers, a widow whose husband was killed by a drunk driver, a widow whose husband drowned in the tragic Staten Island Ferry accident in 2003, and the widow of a Border Patrol agent killed in the line of duty. This practice is an injustice.

The U.S. Court of Appeals for the Ninth Circuit has rejected this interpretation of the statute. *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). The holding in *Freeman* has been followed in a number of courts since. *Robinson v. Chertoff*, 2007 WL 1412284 (D.N.J. May 14, 2007) appeal docketed, No. 07-2977 (3d Cir. July 5, 2007); *Taing v. Chertoff*, 2007 U.S. Dist. LEXIS 911411 (D. Mass 2007), appeal docketed, No. 08-1179

(v) 2008 VSC Liaison minutes say humanitarian requests are reviewed for sufficiency by Customer Service Unit before going to an officer, with a goal that a reinstatement request is reviewed by an Adjudications Officer within 6 months of receipt (posted 3/13/08, AILA Doc. #08031331).

(vi) 2008 CSC Liaison minutes say to file at service center that adjudicated initially, but that no action will be taken until the complete file is received from file control at DOS, and no follow-up inquiries should be made until 18 months have passed (status inquiries to Division XII), and expected review time is about 24 months (posted 8/29/08, AILA Doc. # 08082869).

(vii) 2008 CSC Liaison minutes say CSC will reject requests for humanitarian reinstatement unless the file is physically at CSC, but since there is no tracking system at DOS or USCIS, surviving family members have no way to know when CSC receives a file. Once a request is accepted, CSC’s processing time is 24 months. (posted 11/21/08, AILA Doc #08112165).

(1st Cir. Feb. 11, 2008); *Lockhart v. Chertoff*, 2008 U.S. Dist. LEXIS 889 (D. Ohio 2008), appeal docketed, No. 08-1179 (6th Cir. 2008). The government has appealed these rulings.

More actions have been filed and are pending, including *Hanford v. Chertoff*, Civ. No. SA-08-CA-0795 (XR) (W.D. Texas, Sept. 25, 2008); *Kells v. Chertoff*, No. 08-CV-1582-CAS (E.D. Missouri, Oct. 14, 2008); *Robledo v. Chertoff*, No. AW-08-CV-2581 (D. Maryland, Oct. 2, 2008); *Gorovets v. Chertoff*, No. 08-10094 (LAP) (S.D.N.Y., Nov. 20, 2008); and, *McKoy v. Chertoff*, No. 08-3274 (DKC) (D. Md., Dec. 4, 2008).

The USCIS has directed its adjudicators not to follow *Freeman* outside the Ninth Circuit, finding under 8 C.F.R. § 1003.1(g), the USCIS is legally obligated to follow the precedent decisions of the Board of Immigration Appeals in *Sano* and *Varela* outside the Ninth Circuit, in the absence of a supervening precedent decision of a court of appeals. (See Michael Aytes, Associate Director of Domestic Operations, “Effect of Form I-130 Petitioner’s Death on Authority to Approve the Form I-130; Revisions to Adjudicator’s Field Manual (AFM) Chapter 21.2 (AFM Update AD08-04),” HQDOMO 130/1.3, November 8, 2007.⁹

There is a way to ameliorate the Widow Penalty through a simple administrative policy change – to recognize that once an application for benefits is lawfully filed, the death of the petitioning relative does not automatically strip the survivor of the status of a spouse.

Required Action:

The Department of Homeland Security should withdraw appeals on pending cases and permit judgment to be entered against the USCIS and for plaintiffs with respect to the “Widow’s Penalty” in those cases.

*The Attorney General should identify a case properly before the Board of Immigration Appeals, certify it, and render a decision that vacates Sano and *Varela*, and upholds Freeman nationwide.*

The USCIS should suspend application of the Aytes memorandum in all circuits outside the Ninth Circuit pending necessary action to apply Freeman nationwide.

C. EMPLOYMENT AUTHORIZATION AND DOCUMENTATION

1. Amend Employment Authorization Regulations to Grant Continuing Employment Authorization to Applicants for Extension of Employment Authorization Documents

The recent amendment to USCIS regulations regarding employment verification did not resolve longstanding problems, and may have increased confusion for employers. 73 Fed.

⁹ http://www.uscis.gov/files/pressrelease/I130AFMAD0804_110807.pdf

Reg. 76505 (December 17, 2008). The employment authorization for an alien issued an Employment Authorization Document (“EAD”; Form I-688B or I-766) expires with the expiration of the EAD. An application to extend an EAD may not be filed earlier than 120 days prior to the expiration of the expiring EAD. The USCIS is required by regulation to adjudicate an EAD application within 90 days of filing. 8 C.F.R. § 274a.13(d). The USCIS has not been able to meet that 90-day requirement. The same regulation provides that failure to adjudicate the EAD within 90 days “will result in the grant of an employment authorization document for a period not to exceed 240 days.” Notwithstanding instructions on the Form I-765 Application for Employment Authorization that direct applicants to USCIS local offices to receive “interim” work authorization, local offices no longer have the authority to issue employment authorization documents.¹⁰ Thus, aliens entitled to employment authorization are frequently unable to receive employment authorization documents in a timely manner.

Required Action:

The regulation should be amended to provide for automatic employment authorization for a period not to exceed 240 days from the date of expiration of the prior EAD, or, until the EAD extension application is adjudicated, whichever is first, and that a receipt for the extension application, when accompanied by the expired EAD, shall be satisfactory proof of employment authorization during that 240-day period.

2. Extend the Duration of Continuing Employment Authorization for Temporary Worker Extension Applicants in 8 C.F.R. § 274a.12(b)(20)

Regulations at 8 C.F.R. § 274a.12(b)(20) provide for an automatic extension of employment authorization for an alien nonimmigrant worker in A, E, G, H, I, J, L, O, P, R, or NAFTA TN status for whom a timely application to extend status has been filed. Employment authorization continues for a period of 240 days from the date of expiration of the authorized period of stay, or until the extension application has been adjudicated, whichever is sooner. There is no provision to extend that continuing employment authorization where the USCIS has not adjudicated the underlying extension application within the 240-day time period, which frequently happens.

Required Action:

The regulation should be revised to permit continuing employment authorization for the entire period during which the application remains pending and unadjudicated by the USCIS, including periods of time when a petition or application is on appeal or other review following a denial by the USCIS. The regulations should be amended to confirm that a receipt for the extension application, when accompanied by the expired I-94 or I-94A shall be satisfactory proof of employment authorization during that 240-day period.

¹⁰ See http://www.uscis.gov/files/pressrelease/ElimI688B_081806R.pdf.

3. Update Form I-9 Instructions to Reflect Statutory Changes Regarding Documentation of Employment Authorization for Form I-9

Form I-9 and the current instructions include a very limited list of acceptable documents to show a worker is authorized for employment in the U.S. Many individuals are authorized by statute or regulation to be hired, or to continue their employment, but do not have a document that complies with the current Form I-9 and instructions. Amendments to the INA provide for “H-1B portability” employment authorization under INA § 214(n); “adjustment” or “permanent” portability under INA § 204(j); employment authorization for L-2 spouses under INA § 214(c)(2)(E); and, employment authorization for E spouses under INA § 214(e)(6)). USCIS regulations at 8 C.F.R. § 274a.12(a) allow individuals to be employed in the U.S. incident to status, and regulations at 8 C.F.R. § 274a.12(b)(20) authorized employment for certain nonimmigrant workers while an extension of status is pending. For many of these classes of aliens, the sole document available to show employment authorized status will be a filing receipt for an application pending with the USCIS. Form I-9, however, does not include receipt notices as evidence of continuing employment authorization.

Examples include:

- (1) Spouses of inter-company transferees and spouses of treaty traders and treaty investors are authorized to work incident to status without an employment authorization document.¹¹ But if the L-2 or E-2 spouse does not present a driver’s license and social security card, or if the spouse presents a social security card that says “not valid without DHS authorization,” then the documents are not sufficient under current I-9 instructions and regulations. Legacy INS said the regulations at 8 C.F.R. § 274a.12(a) “are being amended,”¹² but the regulations have never been republished.
- (2) Nonimmigrants in multiple categories are authorized to continue working for 240 days while an extension of status is pending. 8 C.F.R § 274a.12(b)(20); however, the receipt for the extension application is not listed as an acceptable document for completion of the Form I-9.
- (3) Nonimmigrant H-1B visa holders changing jobs or “porting” under the American Competitiveness in the Twenty-first Century Act (AC21) are authorized to begin employment with their new H-1B sponsor upon filing of the new H-1B petition, but the employer has no adequate documentation to satisfy the I-9 employment verification requirements.

Required Action:

¹¹ <https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0100203500!opendocument>.

¹² See USCIS Field Guidance at http://www.uscis.gov/files/pressrelease/E_LEmpAuthPub.pdf.

Immediately update the I-9 form and instructions, which have the force of regulation, to allow employers to accept filing receipts and evidence of status as appropriate to complete form I-9. Amend the employment authorization regulations at 8 C.F.R. § 274a.(12) to reflect current law.

4. Reform the Asylum EAD “Clock” Rules to Prevent Inappropriate Withholding of Employment Authorization from Eligible Asylum Applicants

USCIS regulations require that asylum applications shall be adjudicated within 180 days of filing. 8 C.F.R. § 208(d)(5)(A)(iii). Applicants for asylum in the U.S. are permitted to work under specific conditions. If the asylum application is denied before 180 days have elapsed, employment authorization cannot be granted. 8 C.F.R. §208.7(a)(1). Asylum applicants who work without authorization face severe sanctions if they do not receive asylum.¹³ INA § 208(d)(2) provides:

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

Asylum applicants who filed their applications on or after January 4, 2005, may submit an application for employment authorization after the completed asylum application has been pending for at least 150 days, and USCIS shall adjudicate the application for employment authorization within 30 days, although employment authorization may not be granted until the application has been pending for 180 days. 8 C.F.R. §208.7(a)(1). However, under 8 C.F.R. §208.7(a)(2),

...any delay requested or caused by the applicant shall not be counted as part of these time periods, including delays caused by failure without good cause to follow the requirements for fingerprint processing. Such time periods shall also be extended by the equivalent of the time between issuance of a request for evidence pursuant to § 103.2(b)(8) of this chapter and the receipt of the applicant's response to such request.

In addition to delays caused by the applicant, the 150-day clock stops during the time between the issuance of a request for evidence and the receipt of a response to that request;¹⁴ and the period during which the applicant fails to appear to receive the decision of the asylum officer.¹⁵ Failure to appear for an asylum interview or hearing before the immigration judge permanently stops the clock unless exceptional circumstances are found.¹⁶

¹³ INA § 212(a)(9)(b).

¹⁴ 8 C.F.R. §208.7(a)(2).

¹⁵ 8 C.F.R. § 208.9(d).

¹⁶ 8 C.F.R. § 208.7(a)(4).

Immigration Judges (IJs) have interpreted these regulations to impose excessively strict guidelines for stopping the asylum clock. Operating Policy and procedures memorandum 05-07 from the Executive Office of Immigration Review, “Definitions and Use of Adjournment, Call-up and Case Identification Codes,” provides a list of adjournment codes which will stop the asylum clock, purportedly due to delays caused by or requested by the applicant.¹⁷ IJs stop the clock when an applicant does not accept the earliest hearing date offered by the immigration judge; when a case is adjourned to file additional documentation; during adjournments requested jointly by counsels for ICE and the applicant; and while awaiting scheduling of a hearing to contest removability. On a practical level, a finding of applicant-caused delay seems to be the default position of many IJs, resulting not only in improper clock stopping, but also in failure to restart the clock when the delay has ended. IJs have improperly stopped the clock if the hearing is not completed within the allotted time, even if the applicant has not delayed the hearing, but simply taken more than the scheduled time, and when the IJ rescheduled a previously-accepted date if the alien’s attorney cannot make the new date, although the IJ – not the applicant – rescheduled. There is no formal mechanism for challenging the stopping of the asylum clock.

Required Actions:

Limit the stopping of the clock to those situations where the applicant: has failed to appear for biometrics, thereby causing the interview or hearing to be delayed; requests more time to submit documentation; or requests a continuance at a hearing because he or she is not ready to go forward. Do not permit clock stopping for: delays caused by joint motions; because an applicant contests removability; for failure to appear due to lack of notice or exceptional circumstances; due to requests by the Immigration Judge or Asylum Officer for additional documentation; due to postponements by the IJ, whether or not the applicant accepts the first date offered by the IJ; due to the applicant’s rejection of an individual hearing date scheduled less than 14 days after the Master Calendar hearing contrary to the OPPM; failure of USCIS to schedule a biometrics appointment; or continuances requested because DHS fails to complete the background checks.

Re-start the clock at the point it stopped after a hearing when a motion to reopen is granted because of new evidence which was previously unavailable, including changed country conditions because the applicant does not cause a delay when the evidence was previously unavailable.

Establish an appeals process to challenge IJ decisions to stop the clock.

¹⁷ <http://www.usdoj.gov/eoir/efoia/ocij/oppm05/05-07.pdf>

D. SELECT AREAS OF CONCERN IN DOL FOREIGN LABOR PROGRAMS

1. Clarify DOL SVP and O*NET Occupational/Vocational Requirements

An emerging issue in the Department of Labor's PERM processing involves consideration of whether an employer has justified its experience and educational requirements set out in the ETA 9089 permanent labor certification application form. DOL has not provided guidance in its regulations or in its FAQs on how to interpret the SVP ranges within O*NET as compared to the Job Zones in evaluating whether job requirements in a labor certification application "exceed the SVP level assigned to the occupation as shown in the O*NET Job Zones." 20 C.F.R. 656.17(h)(1). The issue is particularly acute in Job Zone 4, with an SVP level of "7 but less than 8." That phrasing (rather than the simpler "SVP 7") is an artifact of the "stratification" process used to map the 11,000 DOT codes to the 1100 SOC/O*NET codes.¹⁸ In the "stratification" process, jobs with common elements were grouped into "Occupational Units," and the SVP of the Occupational Unit was determined by averaging the SVP values of the jobs that made up the Occupational Unit. A decision was then made to round all fractional values *down* to the next-lower SVP, meaning that an occupational unit made up primarily of SVP 8 jobs with a small number of SVP 7 jobs was downgraded to SVP 7, even where the average value was very close to 8. For example, the "Accountants" Occupational Unit was made up of six jobs at SVP 8 and one at SVP 7, making an average value of 7.85, which became SVP 7, even though the majority of workers in the Occupational Unit are employed in occupations requiring more than 4 years of SVP.

The Inconsistency in "Job Zone 4 equals SVP 7": There is an inconsistency between the description of Job Zone 4 and the SVP level assigned to it if the Department of Labor interprets "SVP 7 < 8" as simply "SVP 7." The narrative description of the preparation for Job Zone 4 is: "A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified." The example in the description makes clear that many positions in Job Zone 4 exceed SVP 7: a four year college degree plus "several" years of experience corresponds to SVP 8, not SVP 7. As noted above, that example is consistent the fact that most separate jobs making up the "Accountants" Occupational Unit in O*Net were previously SVP 8, rather than SVP 7, and indeed most employers would consider such requirements "normal." Therefore, depending on the occupation, there will be an inconsistency between "normal" requirements that exceed the arbitrarily-low SVP code assigned to many Job Zone 4 positions, making a trap for the unwary employer who considers a bachelor's plus three to five years of experience to be "normal" for the position, where such a requirement is normal to the occupation in the US, so that the employer would not consider business necessity documentation to be necessary.

DOL should avoid the inconsistency inherent in the interpretation of Job Zone 4 as equal to "SVP 7" by acknowledging that "SVP 7 less than 8" means "normal" requirements of a position

¹⁸ See Frederick Oswald, et. al., "Stratifying Occupational Units by Specific Vocational Preparation" 4, National Center for O*NET Development 1999, available at www.onetcenter.org/research.html.

that exceed SVP 7, but do not exceed SVP 8, do not require business necessity documentation. Such an interpretation would alleviate the disconnect between employer's normal requirements and the overly-broad Occupational Units into which many SVP 8 jobs have been placed under the O*NET system.

Required Action:

Immediately issue guidance, followed by regulations, that state:

*For the purposes of PERM, application of the SOC/O*NET system will be as follows:*

Educational Requirements will be considered normal to the occupation in one of two ways:

- 1. If the job zone summary designates the specific educational degree as being customary, requiring such a degree will be deemed normal to the occupation and will not be counted against the number of years permitted under a specific SVP code or*
- 2. If a degree is required that exceeds that suggested in the job summary, the degree will not be considered unduly restrictive if the years of required experience/training plus the degree do not exceed the maximum number of years of the SVP assigned to the Job Zone for that occupational code.*

Interpretation of SVP Range

- 1. For the purposes of PERM, the SOC/O*NET SVP ranges will be interpreted to permit the following:*
 - a. For SVP 7 but not equal to or greater than 8, up to the number of years of experience of the higher number in the range minus one year.*
 - b. For SVP 6 but not greater than 7, the same formula as above.*
 - c. For SVP 4 but not greater than 6 up to 2 years of experience is permitted.*
- 2. Revise DOL Regulations to Prevent Individuals Who Are Not Licensed Attorneys or Accredited Representatives From Acting as Agents in Foreign Labor Program Applications**

Much of the existing abuse and potential abuse lies in the lack of definition of who can be a bona fide agent. In contrast to recruiters and agents, there is effective recourse with respect to attorneys who engage in unethical or abusive practices, through state bar disciplinary programs and malpractice lawsuits. The Department of Labor should adopt the long-established guidelines for representation set forth in 8 C.F.R. Part 292 and apply them to representation of employers in the temporary and permanent foreign labor certification programs. These guidelines limit representation to (1) attorneys duly licensed and in good standing in the U.S.; (2) law students and law graduates not yet licensed to practice law who are participating under the direct supervision of a U.S. licensed attorney or an individual accredited by the Board of Immigration Appeals (BIA)

to represent parties before the Board; (3) a reputable individual of good moral character who is assisting a party without direct or indirect remuneration and who has a pre-existing relationship with the person or entity being represented, and; (4) accredited representatives, who are persons employed by an organization recognized by the BIA who has been accredited by the Board of Immigration Appeals. In adopting this standard, the Department of Labor could create more accountability for ethical behavior and abuses, as attorneys and accredited representatives can be held to task. In addition, it would improve the quality level of applications, which is in everyone's interest.

Required Action:

Adopt regulations modeled upon those at 8 C.F.R. Part 292 that limit the authority of individuals to represent parties in temporary and permanent foreign labor proceedings to U.S. attorneys who are licensed and in good standing, and to individuals who are recognized as accredited representatives by the Board of Immigration Appeals.

E. ACCURACY AND APPROPRIATE USE OF NCIC SYSTEM OF RECORDS

1. Require Accuracy of All Data Contributed to NCIC Central Records System

Regulations of the Department of Justice published in March of 2003 exempt the National Crime Information Center (NCIC) Central Records System (CRS) from the accuracy requirements of the Privacy Act of 1974 (5 U.S.C. §552a(e)(5)). See 28 C.F.R. Part 16; 68 Fed. Reg. 14140 (March 24, 2003). This action by the Justice Department was the subject of substantial criticism, with particular focus on the inaccuracy and incompleteness of NCIC, which can both result in the improper arrest and detention of individuals, and can impair effective law enforcement.¹⁹ The continuing expansion of information being contributed to the NCIC since 2003, including the contribution of civil immigration records discussed below, makes all the more imperative the need to immediately withdraw the 2003 revision, and to require that the FBI and all agencies contributing information to the NCIC to comply with the integrity and accuracy requirements of the Privacy Act of 1974.

Required Action:

Rescind the regulations exempting the NCIC CRS from the integrity and accuracy requirements of the Privacy Act of 1974.

2. Postpone Planned Contribution of Civil Immigration Status Violation Information to NCIC

¹⁹ See, e.g., letter of February 20, 2004, to then-OMB Director Joshua B. Bolton from Mark R Rotenberg, Executive Director and Marcia Hoffman, Staff Counsel, Electronic Privacy Information Center (http://epic.org/privacy/ncic/NCIC_letter.pdf).

The United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program has proposed contributing civil immigration status violation information into the National Crime Information Center (NCIC) database, thereby providing all law enforcement agencies access to USCIS information regarding individuals' immigration status.

Presently, three categories of immigration status information are contributed to NCIC: (1) The Deported Felon Category contains records of previously deported felons who have been convicted and deported for drug trafficking, firearms trafficking, or serious violent crimes. (2) The Absconder Category contains records of individuals with an outstanding administrative warrant of removal from the United States who have unlawfully remained in the United States. (3) The NSEERS Category contains records of individuals with an outstanding administrative warrant for failure to comply with the national security registration requirements. Records in these categories are contributed by ICE.

A 2005 study of the use of NCIC immigration data by state and local law enforcement by the Migration Policy Institute found an error rate as high as 42%.²⁰ Compounding the problem of the unreliability of immigration status data already contributed to the NCIC database is that the Department of Justice has exempted NCIC records from the accuracy requirements of the Privacy Act. (See 68 Fed. Reg. 14140, March 24, 2003.) Thus, there is no effective mechanism for oversight and review of the accuracy of data contributed to the NCIC database. To expand the categories of data to be contributed to include civil immigration status information from US-VISIT in NCIC would expose *bona fide* visitors to the risk of detention or arrest by state and local law enforcement based on unreliable or erroneous information.

Required Action:

Hold in abeyance plans to permit US-VISIT to contribute civil immigration status information to the NCIC until mechanisms to determine the reliability of such data are in place, current NCIC immigration status records are verified, and NCIC records are once again subject to the accuracy requirements of the Privacy Act.

²⁰ http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf.