U.S. Citizenship and Immigration Services

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Form I-140

USCIS National Stakeholder Engagement

August 23, 2011

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Form I-140 Categories

- 1st Preference
  - E11 – Alien with Extraordinary Ability
  - E12 – Outstanding Professor and Researcher
  - E13 – Multinational Manager and Executive
- 2nd Preference
  - E21 – Member of the Professions holding an Advanced Degree or an Alien of Exceptional Ability (Not seeking a National Interest Waiver)
  - NIW – An alien applying for a National Interest Waiver who is a Member of the Professions holding an Advanced Degree or an Alien of Exceptional Ability.
- 3rd Preference
  - E31 – Skilled Worker
  - E32 – Professional
  - EW3 – Other Worker

Requirements for 1st Preference

E11 – Alien of Extraordinary Ability (sciences, arts, education, business or athletics)

In general, the petition must be accompanied by evidence that:

1. The individual has sustained national or international acclaim;
2. The individual's achievements have been recognized in the field of expertise;
3. The individual is one of that small percentage who has risen to the very top of the field of endeavor;
4. The individual seeks to enter the United States to continue work in the area of extraordinary ability; and
5. The individual's entry into the United States will substantially benefit prospectively the United States.

An individual may self-petition for an E11.

Requirements for 1st Preference

E12 – Outstanding Professor or Researcher

In general, the petition must be accompanied by evidence that:

1. The beneficiary is recognized internationally as outstanding in a specific academic area;
2. The beneficiary has at least 3 years of experience in teaching or research in the academic area; and
3. The beneficiary seeks to enter the United States for a
   - Tenured Position (or tenure track position) within a university or institution of higher education to teach in the academic area;
   - Comparable position with a university or institution of higher education to conduct research in the area; or
   - Comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Requirements for 1st Preference

E13 – Multinational Executive or Manager

In general, the petition must be accompanied by evidence that:

In the 3 years preceding the time of the beneficiary's application for classification and admission into the United States:

- The beneficiary has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof, and
- The beneficiary seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

1st Preference Stakeholder Topics

1) PhD Researchers
2) Definition of “employee” for multinational executives and managers
3) E11 Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs)
4) Application of the 9th Circuit Court of Appeals *Kazarian* decision on E11 and E12 petitions

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

PhD Researchers

Q. Several stakeholders stressed the importance of PhD researchers to the United States, and encouraged USCIS to be generous in granting visa petitions on their behalf.

A. USCIS acknowledges that researchers are a valuable asset to our country, and provide a wealth of contributions to our society. However, we must still evaluate each case based on the laws and regulations for the classification sought. As long as the researcher can meet the statutory requirements, the petition may be approved. Researchers may be eligible under:

- E11 - alien of extraordinary ability;
- E12 - outstanding professor or researcher; or
- E21 - alien of exceptional ability or advanced degree professional, either with a labor certification or a request for a national interest waiver.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Definition of “employee” for E13

Q. Several stakeholder expressed concerns about E13 denials which included language regarding the employee/employer relationship, especially when the beneficiary has a proprietary interest in the petitioner. Please address the current USCIS policy.

A. Independent of whether a proprietary interest exists, USCIS reviews each petition to verify if there is a valid job offer from the petitioning entity to the beneficiary.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

E11 RFEs and NOIDs

Q. Concerns were raised over Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) in relation to E11 petitions that were perceived to be incorrect or inaccurate. Please address.

A. Current RFE and NOID standards for the E11 classification were developed by USCIS headquarters and went through a public comment period prior to implementation.

If you have any specific instances of incorrect or inaccurate RFEs or NOIDs, please contact the appropriate service center via the National Customer Service Center.

Additionally, SCOPS welcomes you to send RFEs that you feel are erroneous to scopsrfe@dhs.gov. Please note:

- This inquiry does not replace the requirements to respond to the RFE within the period stated on the RFE. As such, you should plan on responding to the RFE as you see appropriate, as a failure to respond could lead to a denial.
- You will not receive a reply to your email.

Application of *Kazarian* on E11 and E12 petitions

Q. A stakeholder requested an update on any forthcoming USCIS guidance to the field on the application of the *Kazarian* decision on E11 and E12 petitions.

A. Adjudicators continue to follow the guidance provided in the December 22, 2010 memo which discusses the evidentiary requirements for Form I-140, which includes the E11 and E12 categories.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Questions?

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Requirements for 2nd Preference

E21 – Members of the Professions holding Advanced Degrees or Aliens of Exceptional Ability (not seeking a National Interest Waiver)

Advanced Degree:

In general, the petition must be accompanied by evidence that:

1. The job for which the beneficiary is being petitioned for requires at least an advanced degree or its equivalent;
2. The beneficiary actually possess the advanced degree or its equivalent; and
3. The Department of Labor (DOL) has certified there are not qualified U.S. workers who applied for the position.

Aliens of Exceptional Ability:

In general, the petition must be accompanied by evidence that:

1. The beneficiary's exceptional ability (degree of expertise significantly above that ordinarily encountered) in the sciences, arts, or business will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States; and
2. The beneficiary's services in the sciences, arts, or business are sought by an employer in the United States.
3. The DOL has certified there are not qualified U.S. workers who applied for the position.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Requirements for 2nd Preference

National Interest Waivers – NIW

If the services provided by a member of the professions holding an advanced degree or an alien of exceptional ability are determined to be in the national interest, the requirement of a job offer, and thus of a labor certification, may be waived. Therefore, the individual's services in the sciences, arts, professions, or business does not have to be sought by an employer in the United States.

An individual may self-petition for a NIW.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Requirements for 2nd Preference

Guidance for adjudicating NIWs comes from *Matter of New York State Dept. of Transportation* ("NYSDOT"), 22 I & N Dec. 215 (Comm. 1998).

NYSDOT outlined three prongs which must be met to qualify for a NIW:

1. The individual seeks employment in an area of substantial intrinsic merit.
2. The proposed benefit will be national in scope.
3. The individual will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

Requirements for 2nd Preference

NIW Physicians

There is a separate blanket waiver for physicians whose work is in the National Interest. If requesting a waiver under this category, it must be established that:

1. The individual will work full-time as a physician in a medically underserved area or in a Veteran's Administration facility, and
2. A federal agency or state department of public health has previously determined that the physician's work in such an area or facility is in the public interest.

NIW physicians are not eligible to adjust their status or obtain an immigrant visa under the NIW or any other preference category unless they have fulfilled their 5-year employment obligation.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

2nd Preference Stakeholder Topics

1) Educational equivalency
2) Foreign medical degrees
3) National Interest Waiver Entrepreneurs
4) National Interest Waiver Physicians

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Educational Equivalency

Q. Can you provide some guidance on educational equivalency for E21 petitions?

A. Equivalency is determined on a case-by-case basis after considering the classification requested, the requirements listed on the labor certification, and the beneficiary's own credentials.

USCIS reviews each case independently. If USCIS determines that the beneficiary's educational background is equivalent to a U.S. advanced degree (that is, a degree above a baccalaureate degree), then USCIS will consider it to be an advanced degree.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Foreign Medical Degrees

Q. A stakeholder has reported instances of RFEs and denials where the beneficiary's foreign medical degree was deemed not to be equivalent to a U.S. medical degree, and requested a confirmation of the standards.

A. A foreign medical degree may qualify as the equivalent of a U.S. medical degree if the beneficiary:

- Has been awarded a foreign medical degree from a medical school that requires applicants to obtain a bachelor's degree equivalent to a U.S. bachelor's degree as a requirement for admission; ***or***
- Has been awarded a foreign medical degree and a foreign education credential evaluation is provided that credibly describes how the foreign medical degree is equivalent to an accredited U.S. medical degree; ***or***
- Has been awarded a foreign medical degree and has passed the National Board of Medical Examiners Examination (NBMEE) or an equivalent examination, such as the U.S. Medical Licensing Examination (USMLE) Steps 1, 2, and 3.

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NIW Entrepreneurs

Q. Can you address the recent expansion of the NIW classification to cover entrepreneurs?

A. While entrepreneurs have always been eligible to file under the NIW provisions, this avenue has not been frequently utilized. Therefore, USCIS has published a Frequently Asked Questions (FAQ) document on its website clarifying that entrepreneurs may obtain an E21 immigrant visa if they satisfy the existing requirements, and also may qualify for a National Interest Waiver under the E21 immigrant visa category if they can demonstrate that their business endeavors will be in the interest of the United States. USCIS will complement this FAQ with internal training on the unique characteristics of entrepreneurial enterprises and startup companies and incorporate input from upcoming stakeholder engagements.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

National Interest Waiver Physicians

Q. A stakeholder requested clarification on several issues relating to NIW Physicians, including:

1) Time employed as a resident/fellow;
2) Time frame for completing the five year commitment period;
3) Continued employment in underserved area after five year commitment period; and
4) Inclusion of specialist physicians.

1) The physician must agree to work full-time as a physician in a qualifying area or facility. This requirement applies even if the physician spent time in residency or fellowship programs. However, any time that the physician was in J-1 status is not counted. Officers may issue an RFE if they need more information on the beneficiary's employment.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

NIW Physicians, cont.

2) The physician has no set time limitation to complete the required years of aggregate service.

3) The physician is required to work a total of five years in an underserved area or a Veteran's Administration facility. Once that five years is complete, they are no longer required to continue working in an underserved area or a Veteran's Administration facility.

4) Form I-140 may be submitted on behalf of primary and specialty care physicians who agree to work full-time in shortage areas or a Veteran's Administration facility. However, dentists, chiropractors, podiatrists, and optometrists do not qualify as specialty physicians.

Questions?

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Requirements for 3rd Preference

E31 – Skilled Workers:

- Individuals who are capable, at the time of filing, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

E32 – Professionals:

- Individuals who hold who hold at least a United States baccalaureate degree or a foreign equivalent degree and who are members of the professions.

EW3 – Other Workers (Unskilled):

- Other individuals who are capable, at the time of filing, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Other I-140 Notes

Ability to Pay:

All I-140 petitions which require employer sponsorship must have evidence that the sponsoring employer has the ability to pay the wage specified in the petition.

Labor Certification:

In general, U.S. employers filing EB-2 and EB-3 employment-based Form I-140 petitions must first obtain an approved labor certification application from DOL on behalf of the foreign worker.

Priority Dates:

The priority date is used in conjunction with the Visa Bulletin issued by the Department of State (DOS) to determine when the beneficiary can apply for adjustment of status in the United States or for an immigrant visa abroad.

Other lesser used I-140 Categories:

- Schedule A (a list of pre-certified occupations codified in 20 CFR 656.5 and 656.15)
- E21 Professional Athletes

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Other I-140 Notes

- The approval of a Form I-140 alone does not grant the beneficiary status in the United States.
- After a Form I-140 is approved the beneficiary will go to a U.S. Consulate to apply for an immigrant visa or, if eligible, a beneficiary in the U.S. may file a Form I-485 to adjust their status to that of a lawful permanent resident.
- To be eligible to apply for an immigrant visa abroad, or to adjust status in the U.S., a visa must be available. The Department of State's visa bulletin takes into consideration the individual's country of birth, the priority date, and the preference category.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Form I-140 – EB Visa Bulletin August 2011

Employment-Based	All Charge-ability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	15APR07	15APR07	C	C
3rd	01NOV05	08JUL04	01JUN02	01NOV05	01NOV05
Other Workers	01MAY05	22APR03	01JUN02	01MAY05	01MAY05

http://www.travel.state.gov/visa/bulletin/bulletin_1360.html

U.S. Citizenship and Immigration Services

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

3rd Preference/Other Stakeholder Topics

1) Ability to pay – subcontractors
2) Premium Processing
3) Priority date retention
4) Service request/G-28 errors
5) Retention of counsel by the beneficiary
6) Processing times

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Ability to pay – subcontractors

Q. Concerns were raised regarding denials for ability to pay in situations where the beneficiary would be replacing a subcontractor who has ostensibly been performing the same duties.

A. Ability to pay is determined on a case-by-case basis based on the overall evidence submitted. Simply stating that an employee will be replacing either another employee or a subcontractor may not be sufficient to demonstrate ability to pay.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Premium Processing

Q. What classification types are eligible for Premium Processing service (PPS)?

A. Currently, petitioners may request PPS on E11, E12, E21 (which is NOT requesting a National Interest Waiver), E31, E32, and EW3 classifications.

As of now, PPS is not available for either E13 (Multinational Executive or Manager) or E21 when requesting a National Interest Waiver.

However, in light of Secretary Napolitano's announcement on August 2, 2011, USCIS will likely begin offering PPS for E13 petitions in early calendar year 2012.

Please visit the USCIS.gov website for more detailed information on how to use the PPS (link here).

Premium Processing, cont.

Q. For classifications requiring a labor certification, PPS may not be requested unless the original labor certification is submitted with the filing. If an employer is unable to request PPS because the original labor certification was lost in the mail, would USCIS consider expediting the I-140?

A. USCIS may consider expediting a petition, as long as it meets the general expedite criteria, as outlined on www.uscis.gov. Reasons for expedite may include severe financial loss, an extreme emergent situation, humanitarian situation, among other scenarios. The inability to file for PPS alone would not be an adequate reason for expedited processing.

Premium Processing, cont.

Q. There is a perception amongst some practitioners that Premium Processing cases are adjudicated more stringently than regular cases. There is also a perception that adjudicators wait until day 14 to issue an RFE or NOID.

A. We acknowledge that a perception exists among clients about the filing of Form I-907 upgrades. However, neither NSC nor TSC has found evidence of such a pattern in looking at objective data about I-140 case filings, and there is no basis in our policy or practice to suggest that the filing of an I-907 for Premium Processing would lead to a different outcome on the I-140. Similarly, we are not aware of any trend towards waiting until the end of the premium cycle to issue an RFE or NOID. Both centers will monitor for any indicators to the contrary.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Priority Date Retention

Q. A stakeholder requested advice on ensuring that a new Form I-140 petition will retain the priority date of a previously filed Form I-140.

A. It is advisable to include a copy of the approval notice of the previous Form I-140 and to request priority date retention in the cover letter. You may want to highlight or bold face the request to ensure that the officer will see the request.

If a Form I-485 is pending and the new Form I-140 has a current visa available, USCIS will resume processing on the Form I-485.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Service request/G-28 errors

Q. A question was raised about responses to service requests not being sent to the attorney of record, as well as the Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, not being recorded in the system.

A. If a G-28 is properly filed with a Form I-140, it should be entered into USCIS systems. In order to be properly filed, it should be signed by the representative and by the petitioning employer; a G-28 signed by the beneficiary cannot be recognized, unless the beneficiary is a self-petitioner under the E11 or NIW classifications.

If a petitioner or G-28 representative submits a service request through the SRMT system, the response will be sent to the email address provided with the request. USCIS cannot provide information directly to the beneficiary, or to an attorney who does not have a valid G-28 on file.

Retention of counsel by the beneficiary

Q. A stakeholder has asked about procedures when a petitioner has authorized the beneficiary to retain outside counsel to prepare the petition, but the petitioner will not sign a Form G-28.

A. If the petitioner refuses to sign a Form G-28 to allow for the appearance of the representative, then USCIS does not recognize the representative. All correspondence will go to the petitioner. The beneficiary does not have any legal standing in the petition, unless he or she is a self-petitioner under the E11 or NIW classification, and any counsel retained solely by the beneficiary will not be recognized.

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Processing Times

Q. The USCIS website indicates that TSC is currently processing first preference petitions filed in September 2010 and that NSC is processing first preference petitions filed in January 2011. Is there any progression in the processing of these petitions?

A. Both NSC and TSC have been working diligently to timely process I-140 petitions, and have made great strides in these processing times.

Please keep in mind that the processing times on the website are only updated once a month, on or around the 15th. The processing time chart will state the date the processing times were calculated.

AILA InfoNet Doc. No. 11072632. (Posted 08/23/11)

Processing Times, cont.

Q. Stakeholders were previously told that TSC hopes to have processing times down to four months by the beginning of Fiscal Year 2012. Is that still the plan, and how likely is it that this goal will be met?

A. USCIS is committed to bringing I-140 processing times within the targeted processing time frames. USCIS is currently allocating resources at each center to accomplish this goal as quickly as possible. We will continue to keep stakeholders apprised of our progress.

Please keep in mind that cases may go beyond processing times based on the issuance of RFEs, the requirement for additional background security checks, or the need to locate related files which may be at other facilities.

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Questions?

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U.S. Citizenship and Immigration Services

Meeting Invitation

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Service Center Operations
Monthly Stakeholder Teleconference

The USCIS Service Center Operations Directorate invites interested stakeholders to participate in the next Monthly Stakeholder Teleconference scheduled for **Tuesday, August 23, 2011 from 2:00pm to 3:30pm Eastern Time**. These engagements present an opportunity for stakeholders to receive current information from service center officials on particular topics of interest. The Nebraska Service Center will host this teleconference with assistance from the Texas Service Center.

The topic for this teleconference will be **Form I-140**, Immigrant Petition for Alien Worker.

Engagement Date	Topic	Deadline for Agenda Items
August 23, 2011	**Form I-140**	**August 8, 2011**
September 27, 2011	Form I-130 (Humanitarian Relief)	

Agenda Items: Please submit items for the August agenda to Nebraska Service Center Community Engagement Officer Kathryn Nicholas at ceo.nsc@dhs.gov no later than close of business, **August 8, 2011**.

RSVP: If you would like to participate in the August teleconference, please provide your full name and the organization you represent to Kathryn Nicholas at ceo.nsc@dhs.gov and reference "August 23 Teleconference" in the subject line.

For additional information, you may contact Kathryn at the email above or by telephone at (402) 219-6405.

We look forward to engaging with you!

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