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Chief, Regulatory Products Division
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
20 Massachusetts Ave., NW, Suite 5012
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Submitted via www.regulations.gov

**Re: Immigration Benefits Business Transformation, Increment I
76 Fed. Reg. 53764 (Aug. 29, 2011)
Docket No.: USCIS-2009-0022**

Dear Chief Aigbe:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the final rule and request for comments, “Business Transformation, Increment I.”

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the final Business Transformation rule and believe that our members’ collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

I. Introduction

U.S. Citizenship and Immigration Services (USCIS) is amending its regulations in preparation for its migration from a paper-based system to an electronic centralized case management system for the filing, receipt, and adjudication of applications and petitions for immigration benefits. USCIS states that this process “will allow USCIS to streamline benefit processing, eliminate the capture and processing of redundant data, and reduce the number of and automate its forms.”¹ The process is

¹ 76 Fed. Reg. 53764 (Aug. 29, 2011).

collectively referred to as “Transformation.” In preparation for Transformation, USCIS has published this final rule to remove references to form numbers, form titles, and internal procedures. In addition, the final rule purports to remove expired regulatory provisions and finalize six interim rules published over the past several years. While we appreciate USCIS’s efforts to streamline benefits processing and automate its systems, we have a number of concerns with the proposed regulations described in detail below.

II. General Comments

USCIS Should Have Published This Rule with Full Notice and Opportunity to Comment

Increment I of the Immigration Benefits Business Transformation Rule was published as a final rule with request for comments. The circumstances in which the Administrative Procedure Act (APA) permits an agency to finalize a rule without first publishing a proposed rule and seeking notice and comment are extremely limited. USCIS must explain why it has “good cause” to find that notice and comment would be “impracticable, unnecessary, or contrary to the public interest.” 5 USC §553(b)(B). USCIS characterizes these regulatory changes into two broad categories: (1) removing form numbers and titles, position titles, and procedural guidance, and reorganizing and clarifying 8 CFR; and (2) removing and updating outdated provisions.² USCIS states that to the extent these changes adopt rules of agency organization, procedure, or practice, they are exempt from notice and comment in accordance with 5 USC §553(b)(A). USCIS also classifies other changes as “ministerial actions necessary to conform regulations with law,” and concludes that advance notice and public comment are unnecessary and not in the public interest under 5 USC §553(b)(B).

However, buried within the maze of technical changes, lay a number of substantive issues, as described below. Any regulatory change in practice or procedure that has the potential to substantively impact petitioners and applicants for immigration benefits is a change that should be promulgated through the appropriate notice and comment provisions contemplated by the APA. We submit that there is no compelling public policy reason or stated USCIS reason to abrogate notice and comment and ask that future increments of the Immigration Benefits Business Transformation rollout be published in accordance with the standard rulemaking process.

Removal of References to Form Titles and Numbers

In explaining the need to remove references to specific form titles and numbers, USCIS states that the use of form titles and numbers “reduces USCIS’s ability to modify its business processes to reflect filing procedures in an electronic environment.”³ Form

² See 76 Fed. Reg. at 53776.

³ *Id.*

numbers are replaced by general phrases and descriptions such as “the form designated by USCIS.” However, there is considerable value to retaining references to form numbers throughout the regulations. The designation of a simple, concise form number in reference to a specific application or petition has many advantages. Form numbers have been used by USCIS and legacy INS for decades and have become a part of the immigration vernacular. Reference to the regulations is a critical step in analyzing immigration issues and deciding on the appropriate course of action. At last count, the USCIS website listed more than 95 different benefits forms. Without a quick way to identify the correct form, one can imagine how easy it would be to select the wrong form, particularly when the regulation itself does not provide any guidance as to which form to use beyond a general description. This is particularly true for applicants and petitioners who do not have the benefit of counsel to walk them through what can often be a very complicated process.

Furthermore, the instructions for many applications and petitions, such as the Immigrant Petition for Alien Worker (Form I-140) are much less comprehensive than the guidance contained in the regulations. In these cases, in order to file a complete, well-documented, approvable application, reference to the regulations is extremely important. If form titles and numbers are eliminated from the regulations (and purportedly from the applications/petitions as well), it will be very difficult for stakeholders to connect the regulatory requirements to the correct form, fee, and filing procedures.

In at least one identified instance, the elimination of the form number in the regulations could easily lead to the selection of the wrong form. USCIS proposes to replace the term “Form I-864” with “affidavit of support.” However, at present, there are two separate and very different forms that are used as affidavits of support: (1) Form I-134, Affidavit of Support; and (2) Form I-864, Affidavit of Support under Section 213A of the Act. The clear reference to Form I-864 as the correct affidavit of support to use in 8 CFR §213A virtually ensures that users select the correct form. Use of the incorrect form will lead to rejection of the benefits application, which can have dire consequences where there is a strict filing deadline or other unforeseen event, such as priority date retrogression.

It should also be pointed out that the stated purpose for eliminating form numbers and titles from the regulations is insufficient. USCIS has not explained how retaining form numbers would reduce its ability to modify business processes. It would appear that USCIS could change its business processes and incorporate electronic forms into the Transformation system, while still retaining simple references to form numbers and titles. At the same time, the agency can add forms, eliminate forms, and change form content as needed, even if form numbers and titles are referenced in the regulations.

If USCIS eliminates form numbers from the regulations, it must provide a means to ensure that the public can easily identify the correct form, fee, and filing instructions for each individual benefit. In addition, USCIS should include references to the appropriate regulations in the “Forms” section of its website to help educate the public on the often more detailed regulatory benefits requirements. This will help to ensure that forms are

completed correctly, that the proper supporting evidence is included, and that the applicant has the opportunity to cite to the regulatory language and state his or her position in favor of eligibility. In addition, the regulations should have clear instructions for locating the form designated by USCIS for each process. For example, the regulations could be modified to include reference to the USCIS website, following the phrase, “the form designated by USCIS for this purpose.”

Removal of Filing Procedures and Internal Processing References

Text relating to filing procedures and internal processing of benefits was removed from a number of provisions. USCIS indicates that these are “not essential to the regulations, do not add substantive requirements or impose limitations, and unnecessarily burden the text of the regulations.”⁴ However, the regulations provide a single-source location for interested parties to obtain important processing information related to specific benefits. While USCIS indicates that such information can be included in field manuals and other instructional materials, sufficiently detailed instructions do not currently exist for most benefits outside of 8 CFR. Moreover, it is unknown how quickly USCIS will issue such guidance once this information is removed from the regulations.

The replacement of form numbers and titles with generic terms, as described above, compounds the confusion. Of specific concern is 8 CFR §207, governing applications for refugee status. The final rule removes the instructions for submitting refugee applications, which specifically reference “Form I-590,” and replaces them with a reference to the form instructions as defined in 8 CFR §1.2. “Form Instructions” is defined in 8 CFR §1.2 with reference to the USCIS website. However, Form I-590 is excluded from the list of forms on the USCIS website.

Moreover, while some sections appear to have been removed under the guise of “internal processing,” other similar sections remain. For example, 8 CFR §204.6(*l*), which relates to the disposition of approved petitions for EB-5 employment creation aliens was removed and reserved. This eliminates the provision for forwarding approved EB-5 petitions to U.S. consular posts for consular processing or retaining the petition for adjustment of status to conditional permanent residency in the U.S. However, the companion regulation for disposition of spousal petitions at 8 CFR §204.2(a)(3) remains. This creates further confusion and should at a minimum, be consistent throughout the regulations.

Deferment of Changes to 8 CFR Part 214

AILA commends USCIS’s decision to withhold implementing changes to 8 CFR Part 214 for separate rulemaking. Changes to this part will have such a broad impact that it is critical that rulemaking be done separately to allow for full and measured consideration

⁴ 76 Fed. Reg. at 53767.

of the changes. While AILA applauds the long-term vision of Transformation, it is critical that USCIS proceed in a manner that ensures future changes ultimately improve the stakeholder experience and do not create new and unnecessary burdens. We look forward to continuing to engage with USCIS regarding the impact and net effect of the Transformation initiatives on our members and their clients.

III. Comments on Specific Regulatory Changes

8 CFR §103.2(a)(7)(iii): The final rule provides that a rejected benefits request will not retain a filing date and adds that there is no appeal from such a rejection. On this point, we submit that historically, there have been many instances where an application or petition was improperly rejected as a result of Service error. We urge USCIS to include a specific regulatory provision permitting the retention of a filing date where the petitioner or applicant establishes that USCIS’s rejection of a benefits request was improper.

8 CFR §103.2(b)(19): The final rule modifies §103.2(b)(19) to provide notification of a decision on a benefits request to applicants, petitioners, and their representatives, but excludes representatives from receiving “documents issued based on the approval of a request for benefits.” This provision, if interpreted to require or permit USCIS to send original receipt and approval notices (Form I-797) to the applicant or petitioner, and not the representative or attorney of record, violates 8 CFR §292.5(a), which states:

Representative capacity. Whenever a person is required by any of the provisions of this chapter to give or be given notice; to serve or be served with any paper other than a warrant of arrest or a subpoena; to make a motion; to file or submit an application or other document; or to perform or waive the performance of any act, such notice, service, motion, filing, submission, performance, or waiver shall be given by or to, served by or upon, made by, or requested of the attorney or representative of record, or the person himself if unrepresented.

On September 30, 2011, USCIS announced, that effective September 12, 2011, it began sending original I-797 receipt and approval notices directly to applicants and petitioners. Previously, the original was sent to the representative or attorney of record if a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative was on file. This sudden change in processing undermined the right of parties to the effective assistance of counsel, and impeded the ability of attorneys to zealously represent their clients. On October 20, 2011, in response to overwhelming stakeholder feedback, USCIS announced that it would return to the prior practice of sending original I-797 receipt and approval notices to the attorney or representative. We applaud USCIS for hearing the concerns of the stakeholder community and quickly working to restore the prior practice.

Our concern with the revised 8 CFR §103.2(b)(19) is that it permits USCIS to at some point return to the misguided practice of excluding attorneys and representatives from receiving original receipt and approval notices. Should USCIS restore this procedure, not

only would it violate 8 CFR §292.5(a) and interfere with the attorney-client relationship, the impact on applicants, petitioners, beneficiaries, employers, and their representatives would be widespread and would have troublesome implications on issues including document security, ability to correct errors in status documentation, coordinating status between principal beneficiaries and spouse/child derivatives, data maintenance, processing delays, increased costs and devotion of employer resources to document management, and driver's license/state immigration enforcement.

8 CFR §103.8: We are also concerned with 8 CFR §103.8, which has been revised to include new language to allow service of notices by electronic means. AILA urges USCIS to include specific language within this section to require routine and personal service to be effectuated through notice to a party's attorney or representative of record even where the party has requested notice by electronic means.

8 CFR §103.9: The final rule revises 8 CFR §103.5b and redesignates it as §103.9. The rule, regarding action on an approved petition, removes the reference to the current Form I-824. In the supplementary information, USCIS notes that as Transformation progresses, it is envisioned that the need for this form will diminish because stakeholders will request the services currently provided on the form by accessing their accounts.

However, we remind USCIS that Form I-824 is used not only for a petitioner or beneficiary to obtain a duplicate approval notice for one's own records, but also as an official means to notify other agencies that USCIS has approved a benefit. For example, H-1B beneficiaries must currently present the original H-1B approval notice to a consulate as part of an application for an H-1B visa stamp. Those who lose or misplace the original approval notice now rely on Form I-824 to obtain a duplicate original. Beneficiaries might not need to apply for an H-1B visa stamp for months or even years after initial petition approval, increasing the likelihood that the original paper approval notice cannot be found at the time it is needed. An effective method of obtaining an actual, physical duplicate approval notice for an applicant to present to the consulate is imperative. Similarly, after a principal beneficiary's application for adjustment of status is approved, the principal files Form I-824 to have notice of the approval forwarded to a U.S. consulate so that the spouse and/or children residing abroad may apply for immigrant visas as following-to-join immigrants.

These are two examples of how the I-824 serves a valid purpose that would not be satisfied by an individual applicant accessing his or her own account. We ask that as Transformation progresses, USCIS not eliminate paper notifications prior to designing and implementing an effective alternative method of notifying other agencies of an approved benefit. Until other agencies, such as the Department of State, no longer require original physical paper notices, it is important that USCIS retain them.

8 CFR §103.16: This section was added to provide guidance on the collection, use, and storage of biometric information. 8 CFR §103.16 is frequently referenced throughout Title 8 and provides, "DHS may use this biometric information to conduct background

and security checks, adjudicate immigration and naturalization benefits, and perform *other functions related to administering and enforcing the immigration and naturalization laws.*” USCIS should clearly define the type of activities that do or could constitute “other functions.”

8 CFR 208.21(c) and (d): Both the current and revised versions of CFR §208.21(c) and (d) effectively eliminate derivative benefit status to children of asylees who reach age 21. These provisions, as currently written and as revised in the final rule state, “The approval ... shall remain valid for the duration of the relationship to the asylee and, in the case of a child, while the child is under 21 years of age and unmarried, provided also that the principal’s status has not been revoked.” This is contrary to INA §208(b)(3)(B), as amended by the Child Status Protection Act, which reads:

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 209(b)(3), if the alien attained 21 years of age after such application was filed but while it was pending.

These provisions should be amended to reflect, as permitted under the INA, that an unmarried child of a refugee/asylee is entitled to derivative status even after he or she turns 21, as long as the application for refugee/asylee status was filed when the derivative was under 21.

8 CFR §223.2(b)(1): While the final rule modifies 8 CFR §223.2(b)(1) regarding the filing of reentry permits, it does not change the existing outdated requirement that an applicant be physically present in the United States to file a reentry permit application. We assert that the physical location of an individual on the day that a reentry permit application is filed is no way indicative of that individual’s long-term intent, and has no relevance to nor bearing on the adjudication of the benefit request. As a result of the physical presence requirement, individuals whose presence abroad is required for an extended period of time must travel to the United States to file the reentry permit application, and must often return several weeks later for biometrics capture. This is a major and unnecessary burden for many individuals.

For example, consider the permanent resident who is required to temporarily return abroad to care for a sick or dying relative. To renew a reentry permit, this person must leave the sick relative to travel to the United States to file the reentry permit application. The applicant is then forced to either remain in the United States for several weeks to await biometrics collection, or depart and incur the time and expense to return for biometrics. Given the goals of Transformation to modernize immigration processes, we encourage USCIS to modify this rule to allow adjudication of reentry permit applications based upon the information contained in the application, as well as that which can be pulled from the substantial resources that the Service currently possesses to examine criminal history, immigration history, and related information.

For the same reasons, or alternatively, we encourage USCIS to utilize this rulemaking opportunity to expressly provide for the capture of biometrics outside the United States. Given the multitude of USCIS offices abroad, it would appear that the necessary infrastructure is already in place to collect biometrics for the small number of individuals who apply for reentry permits while on long-term assignment abroad. Expressly implementing this change would be a way to streamline and remove unnecessary expenses and steps in the process.

8 CFR §245.1(e)(2): The final rule removes and reserves 8 CFR §245.1(e)(2), relating to the adjustment of status of certain H-1 nurses. By removing this section, the final rule also removes 8 CFR §245.1(e)(2)(vi)(B)(3), relating to special immigrant juveniles. It appears that unlike the remainder of §245.1(e)(2), this subsection does not relate specifically to Public Law 101-238 and may have been removed in error. We ask USCIS to reconsider removing this subsection.

8 CFR §245.10(n)(2): The final rule eliminates the specific examples of evidence for demonstrating physical presence on December 21, 2000 for purposes of adjustment of status under INA §245(i). These examples of acceptable documents provide useful guidance to applicants. There is no real purpose in eliminating the examples, particularly since the current regulation specifically states that evidence is not limited to the examples provided. We recommend that USCIS retain the examples listed in this provision.

8 CFR §245.12: The final rule removes and reserves several sections under Part 245. While some sections were removed because the application period has ended and/or there are no longer any eligible applicants, (i.e. 8 CFR §§245.1(e)(2), 245.9 and 245.13), 8 CFR §245.12 (relating to certain Polish and Hungarian parolees) was removed and reserved merely due to a lack of recent filings. Given the fact that there may still be eligible applicants, it does not seem appropriate to remove this or any other similar section merely due to the fact that applications have not been submitted in the recent past. We recommend that this section, and any other section relating to benefits for which applicants might reasonably surface in the future, be retained.

8 CFR §245.22(c): The final rule eliminates the specific examples of evidence for demonstrating an alien's physical presence on any specific date. These examples of acceptable documents provide useful guidance to applicants. There is no real purpose in eliminating the examples, particularly since the current regulation specifically states that evidence is not limited to the examples given. We recommend that USCIS retain the examples listed in this provision.

8 CFR §248.3: Both the current and the final version of 8 CFR §248.3, direct "an employer" to file a change of status request for the variety of work-authorized nonimmigrant classifications enumerated. In accordance with the stated purpose of removing form numbers from the regulations, the final rule removes the reference to Form I-129 in the title of this section ("Change of Status on Form I-129") and replaces it

with “Petition by employer.” We are concerned that by specifically referencing “employer,” USCIS may inadvertently create confusion relating to the O and P nonimmigrant categories. In appropriate circumstances, an agent, rather than an employer, is permitted to file an O or P change of status petition on behalf of a foreign national. We ask that USCIS clarify the language in this section accordingly.

8 CFR §292.4(b): The final rule removes the provision of the existing rule permitting an attorney in a pending matter to “obtain copies of DHS records or information therefrom and copies of documents or transcripts of evidence furnished by him.” We ask that USCIS clarify its purpose in removing this provision. The revised regulation could be read as allowing an attorney to view DHS records in a pending matter, but not to obtain copies. Is it USCIS’s intent to require an attorney to submit a request under the Freedom of Information Act each time he or she seeks copies of records? Such a change would add an undue burden to and would negatively affect the right to counsel. We ask USCIS to make appropriate changes to this provision to ensure that attorneys continue to have necessary access to both view and obtain copies of DHS records in pending matters.

VIII. Conclusion

We appreciate the opportunity to comment on this final rule and look forward to a continuing dialogue with USCIS on these important matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION