

Questions and Answers from the September 9, 2009, AILA-SCOPS call

1. **Post 6th year H-1B extensions under AC21:** AILA asks SCOPS to remind adjudicators of the guidance in Section II, Q&A Number 5 of the December 27, 2005, Michael Aytes Memorandum, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000(AC21)(Public Law 106-313)* (HQPRD 70/6.2.8-P)¹ that a timely and non-frivolous I-140 appeal pending at the AAO allows an alien to request an H-1B extension beyond the 6-year limit. It has been brought to AILA's attention that AC21 H-1B extensions are being denied on the grounds that the beneficiary's I-485 application was denied. However, in these cases appeals of the beneficiaries underlying I-140 petitions remain pending at the AAO. This appears to be a misreading of the December 27, 2005, Aytes Memorandum.

Answer: SCOPS will send a reminder to the Service Centers on this issue. The FAQ is still in effect and there has not been a change in interpretation.

2. **Interfiling I-824 Applications on Pending I-485 Applications:** Please confirm that an applicant may interfile an I-824 Application for Action on an Approved Application or Petition while an I-485 Application for Adjustment of Status remains pending at a Service Center. Generally, applicants have filed I-824 applications in connection with I-485 applications in one of three ways; 1) concurrently filed at the same time as the I-485 application; 2) interfiled while the I-485 remained pending at a particular Service Center to be held in the file for adjudication until the underlying I-485 was approved and; 3) after the I-485 had already been approved. Members are reporting inconsistent treatment of I-824 applications filed while an I-485 application remains pending including denial of the I-824 application. While it is true that the I-824 application can not come to final adjudication and be approved until the underlying I-485 application is approved, the I-824 application should be permitted to be filed and held in abeyance as has generally been the case in the past. Maintaining this option is especially important in cases involving CSPA eligibility for following to join cases to ensure that the I-824 is timely filed and can be acted upon as soon as the underlying I-485 application is adjudicated.

Answer: SCOPS will send a reminder to the Service Centers. An I-824 should not be denied or rejected solely because it is interfiled and the I-485 is not yet approved. While it is best to file the I-824 together with the I-485 (or wait until the I-485 is approved) USCIS understands the reasons why an I-824 may be

¹ **Question 5: Does a timely and non-frivolous I-140 appeal pending at the AAO allow an alien to request an H-1B extension beyond the 6-year limit?**

Answer: Subject to regulatory modification, as long as a decision may be reversed on direct appeal or certification to the Administrative Appeals Office (AAO), USCIS will not consider that decision final for this purpose.

interfiled. However, note that if an I-824 is interfiled, it may not be approved at the same time as the I-485 and the I-485 processing times will apply. In addition, note that there could be a delay due to the routing of the interfiled I-824 to the pending I-485.

- 3. Incorrect Information on Filing For H-1B Cap Exempt Petitioners:** Currently on USCIS.gov the “Direct Filing Addresses for Form I-129, Petition for Nonimmigrant Worker” states that H-1B employers filing petitions which are cap exempt are “encouraged” to file such petitions exclusively at the California Service Center. This is not correct as the filing of these cap exempt cases is mandatory at the CSC.² Members report that petitions seeking cap-exemption filed at the VSC pursuant to the website instructions have been rejected. AILA requests that USCIS revise the Direct Filing chart on the USCIS website immediately. Moreover, AILA requests that SCOPS instruct the field that an application initially submitted to the VSC and rejected as filed in the wrong location not be considered to have been untimely filed under 8 CFR § 214.1 or 8 CFR 248.1(b) solely because of its rejection by the VSC and re-filing at the CSC.

Answer: SCOPS will send notice to the field on this issue. Also, USCIS expects the filing chart information to be corrected on the website.³ As a reminder, petitions by cap exempt employers should be filed at the CSC. This is now mandatory which is confirmed by the instructions to form I-129 on the USCIS website.

- 4. Advance Parole Extension Starting Validity Date:** Please confirm USCIS policy for the correct starting date for an Advance Parole Document renewal. Members are reporting inconsistent start dates (e.g. start date the date of approval vs. start date the day after the current parole expires) even within the same family of applicants. Renewal start dates should be consistent especially within the same family of applicants.

Answer: Advance paroles should be valid from date of approval to one year. USCIS does quality control review to catch parole documents which are not approved in this manner. If they have been approved as of the date that an old parole expires, the new parole is still valid but those dates were issued in error.

² Form I-129 Instructions, page 19, under Exceptions “Additionally, H-1B employers filing petitions which are cap exempt must file at the California Service Center.”

<http://www.uscis.gov/USCIS/Services%20&%20Benefits/Immigration%20Forms/i-129instr.pdf>

³ The corrected chart was posted to the USCIS website on September 11, 2009:

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3df261151e821110VgnVCM1000000ecd190aRCRD&vgnnextchannel=fe529c7755cb9010VgnVCM10000045f3d6a1RCRD>