



## U.S. Citizenship and Immigration Services

# USCIS Service Center Operations and American Immigration Lawyers Association (AILA) Teleconference

## Questions and Answers

### Overview

On December 8, 2010, the USCIS Service Center Operations Directorate hosted an engagement with AILA representatives. USCIS discussed issues related to the interaction between USCIS and the Kentucky Consular Center, H-1B applications and motions to reopen. The information below provides a review of the questions solicited by AILA and the responses provided by USCIS.

### Questions and Answers

**Question 1:** Has Service Center Operations (SCOPS) posted its own minutes from the September SCOPS call yet? If so, where on the USCIS website can the document be found?

**Response:** SCOPS is still working through the process with our Office of Public Engagement. We hope to post our minutes in the very near future.

**Question 2:** AILA was informed that there are problems with updates to the SAVE database. Specifically, it was brought to our attention that Field Offices are seeing an increase in InfoPass appointments from employment based nonimmigrant visa (NIV) holders who changed status from one NIV status to another, typically F-1 to H-1. Apparently, these individuals are unable to obtain Social Security numbers because the change of status was not recorded in the SAVE database up to 3-4 weeks after the effective date of the change of status. Could SCOPS advise whether this was a temporary glitch and whether the problem has been resolved?

**Response:** SCOPS is unaware of any glitches in system interfaces. We have passed the issue on to the SAVE group for review.

**Question 3:** AILA has several questions respecting the interaction between USCIS Service Centers and the Kentucky Consular Center (KCC):

- AILA members continue to experience inconsistent treatment where an approved nonimmigrant petition should be sent to the Kentucky Consular Center for overseas processing, particularly involving petitions coupled with requests for change of status or extension of stay. In many instances, petitioners submit two copies of the petition, expecting one full copy to be forwarded to the KCC at the time of petition approval. Rather than requiring petitioners to indicate on the one copy of the petition that it is to be forwarded to the KCC, would SCOPS please instruct the service centers to automatically send the extra copy of the petition to the KCC upon approval, and to eliminate the need for a specific request?

**Response:** If 2 copies of a petition are submitted and the petitioner requests consular processing, the 2nd copy should be sent via mail to the KCC. If AILA has specific examples where there was a second copy submitted and it was not sent to the KCC, please provide us with the receipt number.

- AILA members have recently reported several instances of long delays in getting cases into PIMS – for example, one AILA member has reported a 4 week delay for an H-1B to be processed in Brazil -- and occasional failures to transmit all or certain portions of the second copy. This then results in visa issuance delays. Would SCOPS, perhaps in conjunction with KCC, devise a process or procedure for petitioners to be able to check whether and when the second copy has been transmitted to KCC or is in PIMS, and what to do when there are long delays in getting the case into PIMS?

**Response:** As mentioned above, USCIS will send via mail a hard copy of an approved petition. However, it is KCC that uploads and/or data enters petition information into PIMS. SCOPS continues to coordinate with KCC to see what can possibly be done to improve upon the process. If AILA has specific receipt numbers where there was a visa issuance delay due to a communication issue between KCC and USCIS please provide us with the receipt numbers as that will assist us in seeing where issues are.

**Question 4:** AILA has been told by the California Service Center (CSC) that there is a memo or other guidance in development addressing the issue of “affiliation” for H-1B cap exemption. Please advise when the draft guidance is expected to be posted for comment.

**Response:** USCIS is reviewing the current guidance on H-1B cap exemption to determine where further guidance is needed. SCOPS does not currently have an estimate for when or if guidance will be drafted and available for comment. At this time, adjudicators have been instructed to utilize the statute, regulations and the June 6, 2006, Michael Aytes memorandum, “Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)” when determining whether a petition qualifies for cap exemption.

**Question 5:** AILA members report different treatment among service centers with respect to the fee payment requirements for Motions to Reopen (MTR) where there is a claim of Service error. In some service centers, if the MTR is submitted without fee and a fee waiver is requested which is denied, the service center grants the petitioner/applicant a period of thirty days within which to submit the required fee. Other service centers simply reject the MTR for lack of fee, placing the petitioner/applicant at risk of losing MTR/appeal rights. AILA urges SCOPS to adopt a consistent policy respecting all MTRs that allege Service error. In cases where an MTR is accompanied by a fee waiver request, if the service center denies the fee waiver request, AILA urges USCIS to adopt a policy to afford the applicant/petitioner a period of 30 days after the denial of the fee waiver request within which to submit the required fee without rejecting the MTR itself.

**Response:** According to 8 CFR 103.5(a)(3), any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision. Section (B) also indicates it must be accompanied by a nonrefundable fee. If an I-290B or MTR is filed with a fee waiver request, the fee waiver request will be reviewed to determine acceptability. If the fee waiver request is denied, the I-290B will be rejected back to the applicant or petitioner. Rejecting the I-290B for fee does not add additional filing time since the requirement in 8 CFR is to properly file within 30 days of the decision.

**Question 6:** The Vermont Service Center (VSC) is stating that if a petitioner waits 30 days to request a duplicate approval notice, the petitioner needs to file an I-824, but if the request is made within 30

days, VSC will provide a duplicate approval notice. The problem is that with standard processing, the individual might not even know there was an approval, or if they e-mail VSC, they might be told by the help desk that they have to wait 30 days after their call to NCSC before emailing. If the policy is indeed that a request for a duplicate approval notice made within 30 days of the approval date will be honored without the filing of an I-824, would SCOPS so advise the field and the public via the USCIS website and allow AILA to issue a practice advisory to that effect?

**Response:** SCOPS recognizes that there is no official guidance surrounding this process that has been informally adopted at one Service Center and is working internally to develop official procedures for all four centers.

**Question 7:** AILA Members are reporting Requests for Evidence (RFEs) and denials on two related issues respecting L-1A petitions:

- In standard petitions, cases are RFE'd or denied for managerial and executive level positions on the ground that the beneficiary will be performing some non-managerial duties. However, under 8 C.F.R. § 212.2(l)(1)(ii)(B) and (C), some non-managerial duties are clearly permitted, provided that the beneficiary performs primarily managerial or executive type duties. Could SCOPS confirm that AILA's interpretation is accurate and if so, could it issue guidance to the field respecting this critical distinction?

Response: SCOPS confirms that the regulatory definitions of both "managerial capacity" and "executive capacity" indicate that the employee primarily needs to perform the duties associated with those employment capacities. SCOPS will review current guidance and determine if additional clarifying guidance is needed.

- Please note that the correct citations that AILA is referring to is 8 C.F.R. § 214.2(l)(1)(ii)(B) and (C).
- In the context of New Office L-1s, AILA members are reporting denials stating that the petitioner failed to show, under 8 C.F.R. § 214.2(l)(3)(v), that the new office will support the beneficiary in a primarily managerial or executive position within one year of approval. These denials appear to ignore evidence presented by the petitioner, pursuant to the regulatory language, that the new office will support an executive or managerial position by virtue of (i) the proposed nature of the office, the scope of the entity, its organizational structure, and its financial goals, (ii) the size of the U.S. investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the U.S., and (iii) the organizational structure of the foreign entity. AILA understands that even with this evidence not every New Office L-1 will meet the test; however, AILA would like to ask that the adjudicators at least consider and analyze the submitted evidence and then, if a denial is in fact issued, articulate why the submitted evidence nevertheless fell short of the regulatory standard.

**Response:** Your interpretation, that an L-1 "new office" petition show that the business in question will support the beneficiary in the requisite managerial or executive position within one year of approval is correct. USCIS will, at the time any extension petition is filed, closely scrutinize the petition not only to determine whether this has occurred, but also to verify that the petitioner has followed through with the commitments it made in the original "new office" petition.

We share your concern that requests for benefits be adjudicated fully based on all the facts presented in a given case. To this end, adjudicators are trained and required to consider all evidence presented in support of a petition including the evidence required under 8 C.F.R. § 214.2(l)(3)(v) for new offices. Adjudicators are also trained to explain clearly in any Notice of Intent to Deny any deficiencies in the evidence submitted. Further, adjudicators are trained carefully to explain any deficiencies in the submitted evidence in a denial letter if a petition is ultimately denied. Petitioners that feel their evidence was not given appropriate probative value should seek review of the petition

through normal review and appellate review processes, set forth in 8 CFR part 103.

SCOPS would appreciate examples documenting yours concern

**Question 8:** Could SCOPS please provide an update on H1-B processing times?

**Response:** H-1B cap processing times have improved significantly since last month. On November 10, VSC reported that their processing date for cap cases is currently September 8. On November 16, CSC reported that their processing date for regular cap cases is September 1. They are at a September 23 processing date for master's cap cases and at September 5 for cap exempt cases.

The VSC's processing date for EOS cases is at June 4. CSC's processing date for EOS cases is at July 16. Both Service Centers are working to improve the H-1B processing times and are providing SCOPS with weekly processing reports.

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[Plug-ins](#)