AMERICAN IMMIGRATION LAWYERS ASSOCIATION

January 29, 2015

Ms. Laura Dawkins
Chief, Regulatory Coordination Division
USCIS Office of Policy and Strategy
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via: USCISFRComment@uscis.dhs.gov

Re: Notice of Request for Information: Immigration Policy
79 Fed. Reg. 78458 (December 30, 2014)
Docket ID: USCIS-2014-0014

Dear Chief Dawkins:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the joint Request for Information (RFI) from the U.S. Department of State (DOS or State) and the U.S. Department of Homeland Security (DHS) on modernizing and streamlining the U.S. immigrant and nonimmigrant visa system, published in the Federal Register on December 30, 2014.

AILA is a voluntary bar association of more than 13,500 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes 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, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws and policies. We appreciate the opportunity to respond to the RFI and believe that our members' collective experience and expertise makes us particularly well-qualified to offer views that will benefit the public and the government.

Scope of AILA's Comments

The RFI rightfully requests input on "the most important" policy and operational changes to streamline and improve the U.S. immigration system. Unfortunately, dysfunctions have layered upon dysfunctions over the years to create an atmosphere of "death by a thousand cuts." Thus, the list of policy and operational changes needed now includes hundreds of items. From that list, we have culled what we feel are the most important. While this shortened list may appear long, these changes would be important strides toward improving the system. Note that we have not included herein any suggestions for improvements that were referenced in connection with the President's November 20, 2014 Executive Action announcement, as we assume that those are already being pursued.

Streamlining the Legal Immigration System: Provide for Meaningful Access to Counsel at All Phases of the Immigration Process

It has been restated so many times as to have become axiomatic—in terms of complexity, the U.S. immigration system is "second only to the Internal Revenue Code…."[1] In addition to navigating clients through an extraordinarily complicated body of law and procedures, attorneys play an important role in maintaining the integrity of the system. As noted in a May 23, 2012 USCIS Policy Memorandum, "this goal is furthered when USCIS adjudicators recognize the range of individuals who may represent applicants and petitioners, respect the relationship between client and representative, and conduct interviews professionally...."[2]

AILA urges DHS and DOS to replace outdated practices and regulations that needlessly restrict access to counsel in federal immigration proceedings, programs, adjudications, and encounters, where citizens, noncitizens, and organizational stakeholders seek to obtain benefits or protect their legal rights. Access to counsel in immigration matters means more than merely allowing counsel to enter appearances in writing, submit evidence, and make legal arguments on behalf of clients. It includes the right of a client to have an attorney present contemporaneously (whether in-person or by electronic means) to make legal arguments orally where a petitioner or applicant seeks a benefit or endeavors to avoid the imposition of a penalty under the immigration laws. It also includes the right to be heard, through counsel, whenever a party has a distinct and identifiable legal interest to protect. Thus, multiple parties with an interest in a given matter should be accorded legal standing and allowed the right to be heard by counsel of their choice. DHS and DOS should provide for a presumptive right of access to counsel. AILA therefore recommends the following changes to departmental and agency practices:

***Department of State*:** Consular officers should no longer be accorded the discretion to ban attorneys from interviews and examinations of visa applicants.[3] Instead, DOS should, by regulation, extend the provisions now in place for attorney representation in consular interviews and examinations in the Iraqi and Afghan Special Immigrant Visa programs[4] to *all* immigrant and nonimmigrant visa applicants and to all individuals seeking to surrender lawful permanent resident (LPR) status or renounce U.S. citizenship. The regulations should also require consular officers to recognize the right to counsel and standing of individual and organizational stakeholders other than visa applicants, including, but not limited to family-based and employment-based petitioners for immigrant and nonimmigrant visa applicants, and associations or universities that have invited foreign nationals to perform or speak before their members or on academic campuses.

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[1] *Castro-O'Ryan v. INS*, 821 F.2d 1415, 1419 (9th Cir. 1987). *See also Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010) ("immigration law can be complex, and it is a legal specialty of its own."); "9/11 and Terrorist Travel," Staff Report of the National Commission on Terrorist Attacks Upon the United States, at 98 (Aug. 21, 2004) ("[e]very immigration benefit has its own set of rules, regulations, and procedures. Many are complex and time-consuming to adjudicate. Some are so difficult to process that specialists must handle them.")

[2] "Representation and Appearances and Interview Techniques; Revisions to Adjudicator's Field Manual (AFM) Chapters 12 and 15; AFM Update AD11-42," PM-602-0055.1 (May 23, 2012).

[3] 9 FAM 40.4 N12.3.

[4] 9 FAM 42.32(D)(11) N12, available at: http://www.state.gov/documents/organization/106197.pdf.

***U.S. Customs & Border Protection*:** CBP regulations should likewise be promulgated to allow the presence of counsel in person, or, if necessary, by electronic means, during secondary and deferred inspection proceedings. The regulations should also recognize the right to counsel and standing of individual and organizational stakeholders other than the applicant for admission in the same manner as proposed above for consular officers.

***U.S. Citizenship and Immigration Services*:** USCIS, by regulation, should provide for (a) a right to prior notice and in-person or electronic access to counsel for site visits conducted by the Fraud Detection and National Security (FDNS) Directorate, and for interviews or examinations conducted at or by USCIS in conjunction with all requests for immigration benefits and all proceedings involving the revocation or intended revocation of a previously approved immigration benefit; and (b) a right of legal standing and right to counsel for all parties with a distinct and identifiable legal interest to protect (e.g., beneficiaries of an I-129 or an I-140 petition, regional centers in EB-5 immigrant investor I-526 and I-829 petitions, individual investors in regional-center I-924 and I-924A submissions, and employers acting as petitioners in I-539 and I-485 applications submitted by employees and their immediate family members.)

<u>Question 1</u>: Streamlining and improving the processing of employment-based and family-based immigrant visas at U.S. Embassies and Consulates

Dedicate Additional Resources to Expand Personnel and Improve Infrastructure at the National Visa Center (NVC) to Handle the Increase in Demand. Over the past year, the number of immediate relative petitions received by the NVC increased significantly. Prior to October 2013, the NVC received an average of 8,000 cases per week. In 2014, that number swelled to up to 25,000 cases per week and as of late fall 2014, had "subsided" to around 17,000 per week. With such a massive increase in workload, processing difficulties and inefficiencies are inevitable. AILA members have reported problems with lost documents, duplicate requests for documents, technical problems with paying the immigrant visa fee online, and failure to respond to customer service inquiries, even after multiple attempts. Though the NVC has made improvements in some areas, problems persist. Therefore, it is critical that the NVC increase staffing and make necessary infrastructure improvements so that it can timely and efficiently process all immigrant visa applications notwithstanding the increase in demand. In addition, in cases involving an urgent business or humanitarian issue or other emergency, DOS should encourage consular posts to accept immigrant visa cases on an expedited basis, thus allowing the applicant to bypass normal NVC procedures.

Streamline the Procedure for Initiating Consular Processing. Under current procedures, a person with an approved I-140 or I-130 immigrant petition who indicated on the petition that he or she would "adjust status" in the U.S., but later decides to consular process, must file an I-824, Application for Action on an Approved Application or Petition in order to transfer the file and start the immigrant visa process. Form I-824 is also required to initiate consular processing for dependents of permanent residents who adjusted status in the U.S. The current USCIS I-824 processing time is six to nine months. This time frame is entirely too long for individuals to wait in limbo or for families to be separated for what should be a simple transfer process. USCIS and

DOS should collaborate on a simplified, streamlined electronic notification procedure for initiating consular processing in these cases.

Modify Form DS-260 to Allow for Initiation of Follow-to-Join Cases. Under current procedures, follow-to-join (FTJ) cases where the principal applicant consular processed can only be initiated by contacting the issuing post. Filing Form I-824, which may be used to initiate FTJ cases if the principal adjusted status in the U.S., is specifically prohibited when the principal has received an immigrant visa at a consulate. In addition, because the DS-260 Application for Immigrant Visa cannot be completed without proof of having paid the visa fees (and the dependent cannot rely on the fee bill of the principal), FTJ cases cannot be initiated by completing a DS-260. Attempts to contact posts directly to initiate FTJ processing have been met with varying degrees of success. Some posts do not publish contact information, while others are unresponsive using posted communication options. Therefore, the DS-260 portal should be modified and DOS should adopt an automated process for initiating FTJ cases.

Modify Forms DS-260 and DS-160 to Provide for General Data Collection. One of the main problems encountered with the electronic Forms DS-260 (immigrant visa application) and DS-160 (nonimmigrant visa application) is the general inability to enter explanatory information. With the old paper forms, applicants were able to enter explanatory information into the form fields or simply provide an overflow sheet with additional information. DOS should either add a tick box next to each question on the forms that allows for the provision of more information, similar to that which is now provided for disclosure of criminal history on the DS-260, or a stand-alone page that allows the applicant to enter any additional information deemed necessary to fully explain his or her answers. This is necessary to avoid exposing the applicant to potential allegations of misrepresentation.

Improve Transparency in Administrative Processing and Prioritize Cases Pending More Than 180 Days. 9 FAM Appendix E, 404 states, “The phrase 'necessary administrative processing' should be used to refer to clearance procedures or the submission of a case to the Department.” Moreover, “Posts should not inform interested persons, including attorneys, that a case has been referred to the Department for a name-check or an advisory opinion….” The term “administrative processing” covers a wide variety of clearances, steps, and procedures. Cases can be held for administrative processing while the post reviews the factual circumstances of an individual case, or obtains a legal advisory opinion or a security advisory opinion. The lack of transparency in administrative processing creates a great deal of anxiety for visa applicants who often do not know why their case is delayed. Compounding matters, applicants are often not allowed to provide additional information to the post, which could be relevant to the review. Though the DOS Administrative Processing webpage informs us that “most [cases are] resolved within 60 days of the visa interview,” many cases languish in administrative processing anywhere from six months to two or more years. With the understanding that national security cannot be compromised, we ask DOS to provide basic information as to the reason for a hold on individual cases, and provide regularly updated processing times for each type of hold on the DOS website. In addition, to the extent that security-related reviews are the product of multiple agencies, DOS and other agencies should endeavor to centralize the security review process to increase efficiency and effectiveness, and include a centralized electronic portal or location for applicants to inquire on the status of their case. Finally, cases on hold for 180 days or more

should be prioritized for clearance. The publication of additional information on administrative processing, including the reasons why a case might be held, and a reliable, effective method for inquiring into the status of a case would serve the interests of government transparency and national security, while assisting visa applicants in making important personal choices. Please note that the difficulties encountered with administrative processing in immigrant visa cases apply with equal force to nonimmigrant visas. Thus, these comments should be taken into consideration when evaluating the nonimmigrant process as well.

Question 2: Streamlining and improving the processing of nonimmigrant visas at U.S. Embassies and Consulates

Fix the Interagency Blanket L Problem. Effective February 14, 2012, DOS issued a final rule amending its regulations to allow the issuance of L nonimmigrant visas for a period of time equal to the reciprocity schedule in effect for the country of the visa applicant's citizenship, which is usually 5 years.[5] The Foreign Affairs Manual (FAM), however, currently limits the period of time for which a Form I-129S may be endorsed to 3 years.[6] The discrepancy between the 5 year validity of the visa and 3 year validity of the I-129S creates a procedural conundrum for blanket L workers and their employers, as there is no clear procedure for blanket L nonimmigrants to continue using a blanket L visa during the two year visa validity period following the expiration of the I-129S. DOS should amend the FAM to permit the endorsement of Forms I-129S for a period up to 5 years. In addition, DHS should amend its regulations to permit the admission of a blanket L nonimmigrant for the period of validity of the I-129S, up to the full five years of visa validity. With these changes, both the employer and the employee would be less likely to inadvertently violate employment eligibility compliance and maintenance of status laws.

Provide a Detailed Explanation with Reference to Case-Specific Facts When a Nonimmigrant Visa Is Denied under INA §214(b). Many nonimmigrants, such as those who seek a B-1/B-2 (visitor) or F-1 (student) visa must demonstrate nonimmigrant intent. INA §214(b) sets forth the statutory grounds for denial of a nonimmigrant visa on this basis. In citing §214(b) as a basis for denial, the consular officer might be concerned by a lack of a residence or job abroad, incongruous interview answers, or insufficient documentation. However, the §214(b) letter issued by posts is "boilerplate" in nature and does not provide any detail specifying the reason for denial. Thus, the visa applicant is left without any basis for overcoming the denial in a subsequent application. DOS should cease its practice of issuing boilerplate §214(b) denials and start issuing letters that include details as to the specific reason for denial. Not only will this improve transparency in the process, it should also decrease the volume of calls and inquiries from applicants seeking this information.

Restore the Domestic Visa Revalidation Process, or Implement a Pre-Approval Process and Expand the Use of Interview Waivers. Citing an increase in interview requirements and the agency's inability to capture biometrics domestically, in 2004, DOS suspended its long-time practice of reissuing or "revalidating" visas in the United States for C, E, H, I, L, O, and P

[5] 22 CFR §41.112(b)(1).
[6] 9 FAM 41.54 N13.6.

nonimmigrants.[7] These individuals now must travel to a consular post to obtain a new visa, thus increasing backlogs at posts and costs for employers and employees. However, at the time of the suspension, DHS did not have as robust a system of Application Support Centers (ASCs) to capture biometrics, nor had the DOS Interview Waiver Program been implemented. In addition, CBP requires applicants for admission to provide ten-print fingerprints for the creation and production of an I-94 Arrival/Departure Record, and has made vast improvements to its "No Fly List" and other security-related capabilities. DOS and DHS should explore the possibility of permitting individuals to appear for biometrics capture at an ASC, and/or other avenues for sharing biometric information with DOS to allow domestic visa revalidation for qualified nonimmigrants. Toward that end, DOS and DHS should establish a domestic visa reissuance unit for the above-referenced nonimmigrant categories and consider expanding revalidation to F (student) and J (exchange visitor) nonimmigrants. Alternatively, DOS should explore the possibility of a process that would permit preliminary approval of nonimmigrant visa renewals whereby DOS would complete the majority of processing, including background checks, while the nonimmigrant remains in the United States. The nonimmigrant would appear at a Visa Application Center, or if needed, at the consulate for a brief interview, to confirm his or her identity, and to obtain the visa stamp. DOS should also expand the Interview Waiver Program.

Create a Business Facilitation Program for Employers. Currently, DOS and USCIS employ the blanket L petition process to facilitate the admission of L nonimmigrants by permitting the employer to "register" a corporate parent, subsidiary, or affiliate. In the E visa context, consular posts often have a registration process which is intended to reduce the need for the company to routinely produce redundant corporate data. DOS and DHS should consider collaborating on a system to permit electronic registration of all other visa sponsoring entities to simplify the application process for prospective employees. This process should be voluntary and open to businesses of all sizes and across all industries. Joint DOS/DHS access to the data would reduce relevant processing times by streamlining the time adjudicators spend verifying the bona fides of the employer.

Standardize the Annotation of B Visitor Visas and Coordinate with CBP to Facilitate the Admission of B Nonimmigrants. The distinction between permissible and impermissible B-1 business activities is subtle and often evolving.[8] Though the annotation of a B-1 visa may help facilitate the admission of legitimate business visitors, posts are inconsistent in the use of such annotations. For example, notwithstanding an October 2012 DOS cable specifically directing posts to annotate B-1 visas issued "in lieu of H-1B" "to avoid possible delays at the ports of entry," some posts do not routinely provide such annotations.[9] B-2 visas for household members and B-1 domestic servants are also not consistently annotated. To facilitate the admission of legitimate yet "non-traditional" visitors, DOS should ensure that such visas are annotated as a

[7] 69 Fed. Reg. 35121 (June 23, 2004) ("We recognize that the domestic reissuance of business-related visas to applicants in the United States has been a convenience to the international business community. However, we are discontinuing the reissuance of visas in these categories because of increased interview requirements and the requirement of Section 303 of the Enhanced Border Security and Visa Entry Reform Act (Pub. L. 107- 173, 116 Stat. 543) that U.S. visas issued after October 26, 2004, include biometric identifiers. It is not feasible for the Department to collect the biometric identifiers in the United States.")
[7] 22 CFR §41.112(d).
[8] 9 FAM 41.31 N.4-N.8.
[9] *See* DOS Cable, "B-1 in Lieu of H," (Oct. 2012), http://www.aila.org/content/default.aspx?docid=41806.

matter of course, and coordinate with CBP to facilitate a smooth admissions process. In addition, this guidance should be clearly stated in the FAM and guidance to CBP officers should be publicly available.

Question 3: Streamlining and improving USCIS processing of immigrant and nonimmigrant visa petitions—General Comments

Improve the Quality and Consistency of Adjudications by Enforcing the Application of the Appropriate Standard of Proof. As stated in the Adjudicator's Field Manual (AFM) Chapter 11.1(c), "[t]he standard of proof applied in most administrative immigration proceedings is the 'preponderance of the evidence' standard." A preponderance of the evidence is evidence that the applicant or petitioner is "more likely than not" eligible for the benefit sought.[10] Requests for evidence in the adjudication of both immigrant and nonimmigrant petitions continue to require, and denials continue to be founded upon documentary demands that, in practical application, set evidentiary thresholds far in excess of that which is required to prove eligibility under the preponderance standard. In addition, as raised at numerous AILA liaison and stakeholder meetings, and as detailed in the 2014 Annual Report of the CIS Ombudsman, "Stakeholders [continue to] cite redundant and unduly burdensome Requests for Evidence (RFEs), and data reveals an RFE rate of nearly 50 percent for L-1B petitions and nearly 43 percent for L-1A petitions in the first half of Fiscal Year (FY) 2014."[11] The issuance of burdensome and unnecessary RFEs wastes USCIS and employer resources and delays action on otherwise approvable filings, thus harming the business interests of U.S. employers.

To restore confidence in the process, USCIS must take immediate steps to reaffirm the appropriate legal standard of review for all application and petition types. USCIS must also ensure that all adjudicators are properly trained on the meaning of the preponderance standard so that they are able to execute their adjudicatory responsibilities more efficiently and effectively. In addition, the regulations at 8 CFR Part 204 and 8 CFR Part 214 should be amended to clearly designate "preponderance of the evidence" as the standard of proof in most immigrant and nonimmigrant petition adjudications. With a greater understanding of the appropriate standard of proof, a decrease in the issuance of unnecessary and burdensome RFEs should follow.

Improve the Quality and Consistency of Adjudications by Curbing the Use of Template RFEs and Denials. USCIS must take steps to bring greater transparency into the adjudications process by articulating case-specific facts and explaining why submitted documentary evidence is deemed insufficient in RFEs and denials. Though USCIS contends that the use of template RFEs and denial letters is intended to improve the quality and consistency of adjudications, these templates are uninformative and fail to provide meaningful information to applicants and petitioners. RFEs and denials that lack detail make it impossible for applicants and petitioners to determine what the adjudicator believed was lacking in the original submission. As a result, applicants and petitioners "over-paper" their responses by resubmitting everything that was previously submitted (in case the adjudicator inadvertently overlooked initial evidence) and supplementing the filing with additional evidence based on guess work. While some template

[10] *See Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).
[11] 2014 Annual Report of the CIS Ombudsman at p. 20, available at: http://www.dhs.gov/sites/default/files/publications/cisomb-annual-report-2014-508compliant.pdf.

language may be useful, USCIS must take the guess work out of the process and provide in RFEs and denials, specific, detailed reasons as to the insufficiency of evidence submitted and/or the factual circumstances that render the applicant or petitioner ineligible for the benefit sought.

Expand Premium Processing to Include More Employment-Based Benefits Requests. Under "premium processing," for an additional filing fee, USCIS will conduct an initial review of a limited array of employment-based benefits requests within 15 calendar days. USCIS should expand the availability of the premium processing service to encompass benefits requests in all employment-based visa categories.

Improve Transparency through the Regular Publication of Policy Guidance, Training Materials, and Standard Operating Procedures. DOS and DHS must be more open toward sharing guidance, standard operating procedures, training materials, and other documents that are relied upon by officers and adjudicators when administering and enforcing the immigration laws and rendering decisions on visa applications. Transparency would be greatly promoted by the open dissemination of DOS visa cables, USCIS standard operating procedures and training materials, and CBP musters. The agencies could accomplish this by posting such materials on their respective websites. The public should not be forced to file a FOIA request to obtain such documents.

Create an Effective Mechanism to Resolve Problem Cases. At present, the primary means of communicating with USCIS is the National Customer Service Center (NCSC). While the NCSC is largely sufficient for routine inquiries, it has repeatedly been proven insufficient and ineffective when an attorney or applicant must quickly resolve an emergency issue or an unusual procedural problem. USCIS should create a mechanism at each processing center to provide direct access to a triage officer with authority to act on individual cases where: (1) a Service error has occurred in the receipting or mailroom process (i.e., documents mailed to the wrong address, wrong name or date of birth is entered on an employment authorization card, etc.); (2) an error on the application/petition is discovered and reported to USCIS in a timely manner; (3) an expedite request has not been appropriately or timely handled through the NCSC process; or (4) other unusual or emergency circumstances (e.g., age-out cases, separation of principal and derivative applications, the application of a precedential court case to a pending petition or application, clear error in H-1B cap cases, etc.).

Amend the Regulations to Recognize L-2 and E-2 Spouses and K-1 Nonimmigrants as Aliens Authorized for Employment Incident to Status. 8 CFR §274a.12(a) should be amended to include spouses of L-1, E-1, and E-2 nonimmigrants in the categories of individuals who are authorized for employment incident to status. Under INA §214(c)(2)(E) and INA §214(e)(6), L-2 and E-1/E-2 spouses who are accompanying or following-to-join a principal nonimmigrant "shall" be authorized to engage in employment in the United States and be provided with "an 'employment authorized' endorsement or other appropriate work permit." Notwithstanding the directive to provide an "employment authorized" endorsement to these spouses upon admission, and the fact that the Social Security Administration (SSA) will issue a Social Security Number (SSN) to L-2 and E-1/E-2 spouses with proof of status,[12] USCIS requires these individuals to

[12] https://secure.ssa.gov/poms.nsf/lnx/0110211530.

apply for and receive an Employment Authorization Document (EAD), a process that often takes 3 months or more. In addition, 8 CFR §274a.12(a)(6) should be amended to remove the reference to "as evidenced by an employment authorization document issued by the Service," and to recognize K-1 fiancés as authorized for employment immediately upon their admission to the U.S. in K-1 status. K-1s may only be admitted to the United States for 90 days, during which time they must marry their U.S. citizen fiancé. Due to backlogs at the service centers, it is not uncommon for the K-1's 90-day period of admission to have ended by the time the employment authorization document is adjudicated.

Automatically Extend Work Authorization Upon Filing a Renewal I-765 EAD Application. An application to extend an EAD may not be filed more than 120 days before the expiration of the prior EAD. Though USCIS must adjudicate an EAD application within 90 days of filing, or issue interim work authorization,[13] USCIS is not always able to meet the 90-day deadline and local offices no longer have the authority or capability to issue interim EADs. To avoid hardship for employers and employees who risk losing their jobs if USCIS is unable to timely adjudicate such requests, USCIS should amend the regulations to provide for an automatic extension of employment authorization upon filing a timely EAD extension. If the regulation for extension of nonimmigrant status is left as is, the automatic EAD extension should be 240 days. If it is changed to the period of pendency of the extension application, as suggested later in this letter, the EAD automatic extension should be the same. In addition, the regulation should provide that the receipt for the extension application, when accompanied by the expired EAD is satisfactory proof of employment authorization for I-9 purposes.

Revamp the Biometrics/Reentry Permit Process. 8 CFR §223.2(b)(1) requires a reentry permit application to be filed while the applicant is in the United States. However, the need to travel often arises suddenly, leaving limited time to file the necessary paperwork. The regulations allow for the submission of applications for refugee travel documents at certain overseas USCIS offices.[14] This regulation should be amended to also permit overseas filings of reentry permit applications. In addition, although 8 CFR §223.2(d) permits an individual to travel after filing the reentry permit application, there are practical difficulties with this regulation. Before proceeding abroad, the reentry permit applicant must choose between waiting in the U.S. for a biometrics notice to be issued and to appear for an ASC appointment, a process which can take several weeks, and departing the U.S. immediately, only to incur significant expense and travel time to return to the U.S. for the biometrics appointment. This procedure is unrealistic for executives or other personnel who are transferred overseas by multinational organizations. Provision should be made for biometrics capture at an overseas USCIS office, U.S. embassy, consulate, or Visa Application Center in cases where it can be demonstrated that emergent travel is required. Alternatively, DHS should explore the possibility of re-using biometrics for benefits applications filed within a specific period of time, or setting up biometrics appointments at the receipt stage to help reduce these costly inconveniences.

Allow Applicants Who Require an Interview to Self-Schedule. USCIS should consider amending its appointment scheduling process at Field Offices to allow clients and/or attorneys to

[13] 8 CFR §274a.13(d).
[14] 8 CFR §223.2(b)(2)(ii).

schedule their own appointments for adjustment of status and naturalization interviews. This option could be modeled from the InfoPass system where the applicant would be instructed to schedule the appointment through the USCIS website by selecting an available appointment slot during a designated two-week time period. A self-selecting interview process would help reduce interview "no-shows" and requests to reschedule, while allowing those who need to travel a great distance to more easily arrange for time off from work or school, or to secure child care.

Family-Sponsored Immigrant Visa Petitions

Update the Regulations for Surviving Relatives/Humanitarian Reinstatement. USCIS should update 8 CFR §204.2 to incorporate the provisions of INA §204(l). Not only has the public not been well-served by the current patchwork of memoranda, teleconference notes, and stakeholder Q&As regarding these provisions, the agency's interpretation is at odds with the views expressed by commenters in response to the informal memorandum. Similarly, 8 CFR §205.1 should be updated to incorporate INA §204(l). Death of the qualifying relative, in and of itself, should not result in automatic revocation of a petition approval. While a post-death evaluation of the beneficiary's U.S. residence and the affidavit of support requirements is necessary, this analysis can occur during the individual's adjustment of status interview or during consular processing. The revocation and reaffirmation process leads to extreme delays of many months or years, and is a waste of resources.

Make the K-3 Process Meaningful. With the passage of the LIFE Act in December 2000 Congress enacted a policy that would, in theory, allow foreign spouses to join their U.S. citizen spouses in the U.S. while they await processing of their permanent residence applications. However, USCIS has adopted a policy to adjudicate the K-3 petition (Form I-129F) and petition for alien relative (Form I-130) simultaneously, thus eliminating the benefits of the K-3 petition. DOS takes the position that when the I-129F and the I-130 are approved together, the beneficiary becomes ineligible for a K-3 visa and proceeds with the immigrant visa application. USCIS should amend its current policy and adjudicate K-3 petitions within 30 days of filing to achieve Congress's clear mandate.

Employment-Based Immigrant Visa Petitions

Clarify and Confirm Roles of USCIS vs. DOL in the Employment-Based Immigrant Visa Process. AILA has observed a number of cases where USCIS questions certain components of the labor certification application that was certified by DOL and included with the I-140 petition. This includes requests for proof that U.S. workers were considered for the underlying position, evaluation of the employer's job requirements as compared to the Occupational Outlook Handbook (OOH), evaluating the appropriateness of the employer's job requirements, and questioning whether employment gained at the petitioning employer is in a substantially different position. USCIS may invalidate a labor certification only if it determines there was fraud or willful misrepresentation.[15] DOL has exclusive authority to determine eligibility as delineated in 20 CFR §656.17, and courts have emphasized the distinction between DOL's authority to *set* the requirements for the job and USCIS's authority to determine whether the beneficiary *meets* those

[15] *See* AFM instructions in Chapter 22.2; 20 CFR §656.32 (revocation); 20 CFR §656.30(d) (invalidation).

requirements.[16] As set forth in AFM 22.2(b)(3), USCIS must limit its role in adjudicating I-140s to determining whether the alien satisfies the job requirements set forth in the labor certification and whether the employer has the ability to pay.

Clarify that a Priority Date Is Retained Where the Previous Employer Withdraws the I-140. 8 CFR §204.5(e) provides for the retention of a previously accorded priority date under INA §203(b)(1), (2), or (3), with respect to any subsequently approved petition under INA §203(b)(1), (2), or (3). The regulation further states that "[a] petition revoked under sections 204(e) or 205 of the Act will not confer a priority date, nor will any priority date be established as a result of a denied petition." Chapter 22(d)(1) of the AFM provides that the earlier priority date will be retained unless the previously approved I-140 has been revoked due to fraud or willful misrepresentation. USCIS has interpreted this provision to preclude priority date retention where an earlier I-140 petition is simply *withdrawn* by a former employer, even where there is no indication or allegation of fraud or willful misrepresentation. USCIS should amend the regulation to specify that mere withdrawal of an approved I-140 by the employer is not a basis for refusing to retain an earlier priority date.

Hold Adjustment of Status Applications in Abeyance While the Appeal of a Denied I-140 Is Pending. USCIS should eliminate the policy to deny a concurrently filed I-485 adjustment application where the related I-140 petition is denied. Instead, the I-485 should be held in abeyance pending the I-140 appeal or motion to reopen, or until the time period to appeal has lapsed. Holding the I-485 in abeyance during the pendency of an appeal or motion to reopen would allow the applicant to continue to receive employment authorization and advance parole.

Nonimmigrant Petitions

Clarify that Established Facts Should Not Be Readjudicated Absent Fraud or True Gross Error. Petitions to extend nonimmigrant status, where there has been no change in the underlying job or employer, should be streamlined and should not be subjected to RFEs on facts that have been established in the prior adjudication absent fraud or clear error (i.e., not as a matter of judgment). Such RFEs cause considerable delay and unnecessary hardships for both the employer and the employee, and waste USCIS's limited resources. And, certainly, petitions in these circumstances should not be denied. Denials of extensions when there have been no changes in relevant facts are highly disruptive, and serve as a powerful disincentive for investment and job creation in the U.S. Similarly, established facts should not be readjudicated in cases involving the same employee and employer when reviewing an immigrant visa petition for an individual in a parallel nonimmigrant category (e.g., an EB-1 executive or manager in L-1A status for the same employer; or an EB-1 alien of extraordinary ability in O-1 status). In addition, greater deference must be accorded adjudications across agencies. It is extremely disruptive to a company's ability to do business when an employee who entered the U.S. on a blanket L after applying directly at the U.S. consulate, is denied an extension of status by USCIS when there has been no change in the underlying position or employer.

[16] *See e.g., Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987, 990(7th Cir. 2007).

Eliminate Ultra Vires Regulations from the O and P Nonimmigrant Provisions. In 2004, USCIS confirmed that an "O-1 nonimmigrant may be admitted even if the work to be performed in the United States does not require a person of extraordinary ability or achievement."[17] However, 8 CFR §§214.2(o)(2)(iv)(D); 214.2(o)(5)(ii)(A) and 214.2(o)(5)(iii) still state that the assignment or event must require the services of an individual with extraordinary ability. Because there is no authoritative basis for this requirement, the regulations should be amended to remove this language. In addition, 8 CFR §214.2(p)(4)(i)(B) states that a P-1 entertainment group or athletic team "must be coming to perform services which require an internationally recognized entertainment group or athletic team." There is no statutory basis for the requirement that the services to be performed require an internationally recognized entertainment group or athletic team. This portion of the regulation should be removed.

Allow for Continuing Employment Authorization for the Duration of a Pending Petition to Extend Nonimmigrant Status. 8 CFR §274a.12(b)(2), which currently provides for an automatic 240-day extension of employment authorization for certain nonimmigrants who timely file a petition to extend such status, should be revised to permit continuing employment authorization for the entire period during which the petition remains pending. This extension of work authorization should also include the time frame when a petition is on appeal or pending other review following denial by USCIS.

Permit Travel Without Advance Parole for Adjustment of Status Applicants in Lawful E, O, P, or TN Nonimmigrant Status. 8 CFR §245.2(a)(4)(ii)(C) allows an applicant for adjustment of status, who is not in removal proceedings, and who is in lawful H-1 or L-1 status to travel without advance parole and reenter the U.S. with a valid H-1 or L-1 visa, assuming the individual remains eligible for H or L status, and is coming to resume employment with the same H or L employer. This regulation should be expanded to adjustment of status applicants in other valid nonimmigrant classifications such as E-1, E-2, E-3, O-1, P-1, and TN. Moreover, the admission of individuals who hold both a valid nonimmigrant visa and advance parole document should be governed in accordance with the procedures contained in Question 5 of the May 16, 2000 legacy INS Memorandum by Michael D. Cronin, "AFM Update: Revision of March 14, 2000 Dual Intent Memorandum."[18]

Recognize Dual Intent for Additional Nonimmigrant Categories. Dual intent is recognized by statute for H-1B, L-1 and V nonimmigrants, and has been expanded by regulation to O and P nonimmigrants. DHS should issue regulations further expanding the concept of dual intent to other nonimmigrant categories such as F, TN, and E. The establishment of "intent" is challenging at best and often erratic in application. Adjudication of status should focus solely on compliance with the relevant nonimmigrant category.

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[17] *See* USCIS Office of Business Liaison, Employer Information Bulletin 15, "Aliens with Extraordinary Ability (O-1) and Accompanying/Assisting Aliens (O-2)" (Dec. 8, 2004). *See also*, AFM ch. 33.4 ("[i]n support of all O- 1 petitions, the petitioner must establish that the beneficiary has met the standards or demonstrated that he or she possesses sustained national or international acclaim and recognition in his or her particular field and that the alien is coming to work in that field (but not necessarily that the particular duties to be performed require someone of such extraordinary ability.)"

[18] "If an alien has a valid H-1 or L-1 nonimmigrant visa and is eligible for H-1 or L-1 nonimmigrant status and also has a valid Form I-512, he or she may be readmitted into H-1 or L-1 status or be paroled into the United States. It is the alien's prerogative to present either document at inspection."

Humanitarian Petitions and Applications

Recognize that Individuals Who Have Been Granted Temporary Protected Status (TPS) Are Eligible for Adjustment of Status. USCIS can permit TPS beneficiaries to adjust status to lawful permanent residence if they are otherwise eligible to do so upon the approval of an immigrant visa petition. In *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013), the Sixth Circuit recognized the sound legal arguments associated with this position. Unfortunately, USCIS does not recognize this reality for those living outside the jurisdiction of the Sixth Circuit. The *Flores* decision should be adopted nationally.

Provide for Generous Use of Interview Waivers for VAWA and Special Immigrant Juvenile Adjustment of Status Applications. I-360 petitions for spouses who are abused or subject to extreme cruelty are filed and adjudicated at the Vermont Service Center (VSC). The VSC VAWA unit is specially trained in issues relating to domestic violence. Once the I-360 is approved, the adjustment must be adjudicated and will generally require an interview at a local USCIS office. USCIS should permit interview waivers for VAWA-based adjustments unless after VSC review it is clear that a waiver is required. Alternatively, 8 CFR §204.2 should be amended to prohibit local office adjudicators from readjudicating the underlying I-360 petition. Interview waivers should also be implemented for I-360 special immigrant juvenile (SIJ) cases. No child should have to go through the trauma of describing the abuse and neglect suffered, or the circumstances surrounding abandonment. The state court dependency order, if deemed sufficient by the service center, should serve as prima facie evidence of the child's eligibility.

Provide for a Generous Humanitarian Parole Policy for Overseas Derivatives of U-1 Petitioners. Due to the cap on the number of U-1 nonimmigrant visas that maybe issued in any fiscal year (10,000), U-1 petitioners who are deemed eligible for relief are placed on a waiting list and may receive deferred action while they await issuance of a U-1 visa. Though the cap does not apply to derivative family members who are accompanying or following to join the principal, derivatives outside the United States may not enter the U.S. until the principal receives the U-1 visa. This causes many families to be separated for lengthy periods of time. In order to unite these families, USCIS should implement a generous humanitarian parole process for qualifying family members of U-1 petitioners with deferred action who are stuck outside the U.S.

Protect Derivative Step-Children of VAWA Petitioners. In VAWA cases where the abused spouse includes a step-child as a derivative on the application, if the step-parent and abusive U.S. citizen spouse divorce, the step-child loses the ability to apply for VAWA unless there is an ongoing relationship with the abusive U.S. citizen. USCIS should amend this policy and allow step-children to proceed as derivatives on the step-parent's VAWA application as long as the step-parent files for VAWA relief within two years of the divorce.

Provide for Travel and Work Authorization for U Nonimmigrants. U nonimmigrants who wish to travel abroad prior to filing a Form I-485 adjustment application must undergo consular processing each time they depart. By contrast, T nonimmigrants seeking to travel abroad must obtain advance parole prior to departing the U.S. U nonimmigrants should be treated the same as

T nonimmigrants and be permitted to apply for and receive advance parole prior to departing the U.S. to facilitate reentry.

Expedite the Admission of Spouses and Children of Asylees and Refugees. Individuals who have been granted asylee or refugee status in the United States are given two years to file Form I-730 to have their spouse and children join them in the United States. It is currently taking 5 months to process I-730 petitions at the Texas and Nebraska Service Centers. Several weeks or months are then added while the relative goes through the consular process and awaits security clearances. Meanwhile, these family members may be experiencing persecution or be in imminent danger of persecution and are constantly at risk. I-730 petitions and consular processing should be prioritized for expedited processing. USCIS should set and comply with a processing goal of 3 months for these petitions.

Direct DOS to Comply with INA §245(l)(7). INA §245(l)(7) states that VAWA, T, and U applicants shall be eligible to apply for a waiver of any fees "associated" with VAWA, U, and T applications. While DHS permits fee waivers in such cases, DOS does not. DOS must implement a procedure to permit waiver of visa fees in connection with VAWA, U, and T cases in order to come into compliance with the statute. Additionally, DOS must discontinue requesting Form I-864, Affidavit of Support because VAWA, U and T applicants are exempt from the public charge ground of inadmissibility under INA §212(a)(4)(E).

H–1B Temporary Worker Visa Petitions

Restore Flexibility in the Adjudication of H-1B Petitions for "Specialty Occupation" Employees and Eliminate Unnecessary Barriers to this Visa Category for Small and Emerging Businesses. The H-1B is available to nonimmigrants who hold a U.S. degree, a foreign equivalent degree, or its equivalent in training and experience, in a body of highly specialized knowledge, whose services are petitioned for by a U.S. employer to perform duties in an occupation that requires that degree or highly specialized knowledge. It had been a longstanding practice of USCIS, and INS before, to recognize that in many occupations, the requisite "highly specialized knowledge" can be gained through study in one or more disciplines.

However, USCIS has been applying for several years a policy to restrict approval of H-1B petitions to occupations in fields where study in only one academic discipline, or very few disciplines, can provide the requisite specialized knowledge. This restrictive interpretation has emerged in fields as diverse as business, marketing, financial management, advertising, some applied sciences, some fields in engineering, and in computer and information technology. Needless to say, the impact of this impermissibly narrow interpretation hurts businesses in all fields of enterprise, and particularly impacts small and emerging businesses which often rely significantly on the expertise of specialists to support their development and growth. USCIS needs to bring H-1B adjudications in line with historic law and policy.

Do Not Require a New H-1B Petition Every Time a New LCA Is Filed for a Change in Job Location. If an H-1B employer remains the same, and an H-1B position remains the same, an employer should not have to file a new H-1B petition every time the employee changes locations, as long as there is a Labor Condition Application (LCA) filed for that position for the

new location. On the LCA, the employer has made promises to abide by DOL regulations regarding employment of an H-1B worker in the position at the specific worksite, and DOL has the power to enforce those promises. Statements made by agency officials in the past have led many to believe that an amended petition is not required, but some USCIS adjudicators think otherwise. Requiring the employer to file an H-1B amendment in addition to the LCA is time consuming and wastes a company's money, as well as USCIS resources, especially considering that in order to employ the worker at the new site in a reasonable amount of time, the employer must assume the additional expense of premium processing.

Provide for a More Generous Definition of "Affiliated or Related" for Cap Exemption Purposes. 8 CFR §214.2(h)(19)(iii)(B) defines affiliated or related non-profit entity as "[a] nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary." This definition is too narrow and has had a negative impact on H-1B adjudications for teaching hospitals and other nonprofit petitioners related to or affiliated with institutions of higher education. The impact on physicians, of which there is a noted shortage, is particularly problematic. The regulation should be amended to adopt a more flexible definition that accounts for a broader range of relationships between universities and nonprofit entities.

Expand Employment Authorization to All Spouses of Employment-Authorized Nonimmigrants. This will further the U.S. objective of making the U.S. more attractive to highly skilled workers.

Question 4: Streamlining and improving the process of changing from one nonimmigrant status to another nonimmigrant status

Provide Relief for Aspiring F-1 Students by Speeding Up Processing of Change of Status Applications. At present, a request to change status to the F-1 student classification can take from 2 ½ to 6 months to process. This delay can create problems for students whose course of study may be starting before the change of status can be adjudicated. USCIS should endeavor to adjudicate all change of status requests to the F-1 classification within 2 months, or provide for 2-week premium processing.

Toll Unlawful Presence While an Appeal or a Motion to Reopen or Reconsider the Denial of a Change or Extension of Status Is Pending. Under current USCIS policy, unlawful presence starts to accrue on the day of the denial of a request for extension of status or change of status regardless of whether the applicant or the petitioner appeals the denial or files a motion to reopen/reconsider. If the denial is reversed, the approval of the change or extension of status is retroactive and no unlawful presence is deemed to have accrued. However, if the denial is upheld or the motion is denied, USCIS considers unlawful presence to have accrued since the date of denial of the underlying petition. If six months or more of unlawful presence accrues, the applicant will be subject to the 3 year bar upon departure. With appeals at the AAO taking an average of 6 months, it is almost certain that any applicant who chooses to exercise his or her right to appeal will be subject to the three year bar (at a minimum) if they are not successful.

USCIS should amend its guidance on unlawful presence to provide that unlawful presence will not start accruing until the date of the denial of the motion or appeal to avoid penalizing or discouraging legitimate requests for due process.

Question 5: Streamlining and improving the adjustment of status process

Hold Adjustment of Status Applications in Abeyance While I-601 Waivers Are Pending Appeal. USCIS should eliminate the policy to deny a concurrently filed I-485 adjustment application where the related I-601 waiver is denied. Instead, the I-485 should be held in abeyance pending the I-601 appeal or motion to reopen, or until the time period to appeal has lapsed. Holding the I-485 in abeyance during the pendency of an appeal or motion to reopen would allow the applicant to continue to receive employment authorization and advance parole, and would mitigate hardship on U.S. citizen and permanent resident qualifying relatives, especially in cases where the appeal is sustained and the I-601 waiver is granted.

Issue Clear Guidance that Permits Counting Time Spent in the United States Toward Satisfaction of the 3/10 Year Bars. USCIS should issue a clear directive confirming that the 3- and 10-year bars under INA §212(a)(9)(B)(i) begin to run from the date of the individual's last departure from the U.S. and that any time following that date of departure, whether spent in or outside the U.S., counts toward satisfying the bars. Such a directive not only maintains consistent policy, but remains in line with the statutory language and developing case law.

Question 6: Streamlining and improving the inspection of arriving immigrants and nonimmigrants at U.S. ports of entry

Expand Automatic Visa Revalidation for Nonimmigrants Who Travel Outside the U.S. for 30 Days or Less. Under 22 CFR §41.112(d), nonimmigrants with an expired visa who travel to a contiguous territory may be admitted to the U.S. without a new visa if they meet certain conditions. DHS should consider expanding this to include nonimmigrants who travel anywhere beyond the contiguous territories of the United States to reduce the time delays and burdens associated with obtaining a new visa when employment has not changed.

Improve the Traveler Redress Inquiry Program (TRIP). DHS TRIP is intended to be "a single point of contact for individuals who have inquiries or seek resolution regarding difficulties they experienced during their travel screening at transportation hubs," including denied or delayed airline boarding, denied or delayed entry into the United States at a POE, or regular referral to secondary inspection.[19] Unfortunately, TRIP is an ineffective redress system for individuals who are routinely referred to secondary or deferred inspection for additional screening, but who are ultimately always admitted. DHS must take steps to make TRIP more effective, including developing a process to clear persons with outdated, irrelevant, or innocuous prior violations in order to facilitate international travel and free up agency resources to focus on real threats to national security.

[19] http://www.dhs.gov/dhs-trip.

Create a Unified Policy on the Accrual of Unlawful Presence for Canadian and Mexican Visitors. USCIS and DOS have long taken the position that a Canadian citizen who enters the United States as a visitor and is not provided an I-94 arrival/departure record is admitted for an authorized period of "duration of status" (D/S) for purposes of determining future unlawful presence. Conversely, CBP takes the position that a visa-exempt Canadian visitor is admitted for a maximum of 6 months, and begins to accrue unlawful presence if he or she remains in the United States beyond 6 months. DHS should ensure that all DHS components abide by the long-standing USCIS/DOS interpretation on unlawful presence for Canadian visitors. In addition, DHS should confirm that Mexican citizens visiting the U.S. under a border crossing card/laser visa admission also do not accrue unlawful presence since no I-94 admission record is issued.

Expand the Global Entry Trusted Traveler Program. Global Entry is a CBP program that allows expedited clearance for pre-approved, low-risk travelers upon arrival in the United States. At present, Global Entry is open to only a handful of nationalities. DHS should expand Global Entry to facilitate the entry of frequent business travelers and nonimmigrant visa holders, without regard to nationality. The expansion of this program and related programs such as NEXUS and SENTRI for frequent border crossers must be accompanied by increased transparency regarding program eligibility. The current CBP Ombudsman review process is often opaque and does not serve as an effective or fair redress process. In addition, factors such as the time that has elapsed since an incident of concern occurred and the level of penalty imposed should be given more weight when balancing the equities and determining program eligibility.

Dedicate Resources to Expand Land POEs, Increase Staffing, and Increase Training. One of the biggest factors slowing down processing at land border crossings is the physical size of the facilities. DHS should seek and dedicate additional funds to expand the number of lanes on international bridges, the number of primary inspection booths, and the number of officer kiosks and passenger seats in secondary inspection to help facilitate the flow of people. But even with existing facilities, we often observe closed primary inspection lanes and unmanned desks at secondary inspection during peak and off-peak travel times. Therefore, an increase in staffing will also help facilitate the flow of travelers. Officer training is also critical and lack of training on complex immigration matters results inefficiencies and errors in processing. A tremendous amount of staff time and resources is dedicated to correcting errors at deferred inspection locations which could have been avoided during the initial inspection and admission process.

Leverage Software and Database Improvements to End Antiquated Biometrics Intake. It appears that biometrics captured by DOS during immigrant visa issuance cannot be transmitted to USCIS for purposes of generating permanent resident cards. As a result, CBP is required to take the applicant's fingerprints upon entry into the United States. This antiquated process wastes precious CBP time and resources. Biometrics/fingerprint data should be transmitted directly to USCIS when it is captured by DOS during consular processing.

Publish Unlawful Presence Regulations. The concept of unlawful presence as it relates to the three-, ten-year, and permanent bars to admissibility under INA §212(a)(9)(B) and (C) was established in 1996 with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act. Though extensive memoranda have been released interpreting unlawful presence, no regulations have been issued. The promulgation of regulations on unlawful presence

could help fix a number of issues and inconsistencies in interpretations that have arisen over the years. Among other things, we ask that such regulations include clarification: (1) that the statutory exceptions to unlawful presence under INA §212(a)(9)(B)(iii), including no accumulation of unlawful presence for minors (under age 18), apply to INA §212(a)(9)(C); (2) that unlawful presence does not accumulate while an individual is in removal proceedings, until a removal order becomes final; and (3) that one day or a short period of unauthorized employment shall not trigger the accrual of unlawful presence for bona fide asylum applicants. The regulations should also fix the problems with interpretation of unlawful presence for Canadian visitors and Mexican BCC entrants, as described above.

Question 7: Attracting the world's most talented researchers to U.S. universities, national laboratories, and other research institutions

AILA applauds the initiatives announced with the Executive Actions, and looks forward to their implementation. Many of the recommendations outlined herein, such as expanding the definition of "affiliated or related" for H-1B cap-exemption purposes, and increasing transparency in administrative processing and technology-related security delays, will positively impact researchers and academics. In addition, we offer the following suggestions:

Restore the Analytical Framework Articulated in Buletini v. INS for Adjudicating Extraordinary Ability, Outstanding Researcher, and Exceptional Ability Petitions. The two-step analysis for adjudicating EB-1 Extraordinary Ability and Outstanding Researcher petitions, and EB-2 Exceptional Ability petitions that was adopted by USCIS following the 9th Circuit decision in *Kazarian v. INS* has resulted in confusion, complicated RFEs, and unprecedented and unnecessary denials of permanent resident status for highly-skilled individuals who if admitted, would contribute significantly to our national economy and cultural enrichment. *Kazarian* must not be read alone, as the principles found in *Buletini v. INS*, 860 F. Supp. 1222, (E.D. Mich. 1994) and other cases that address the statutory and regulatory framework are essential and instructive. Under *Buletini*, all initial evidence should be qualitatively evaluated to determine its credibility, value, and whether a prima facie case has been established. If the petitioner has presented a prima facie case, the burden shifts to USCIS to articulate substantiated, specific reasons why the petitioner has not met the burden. Otherwise, the burden of proof has been satisfied and USCIS must follow the regulatory framework to approve the benefit. The imposition of a totality of the circumstances determination and re-analysis of submitted evidence goes beyond the applicable statutory provisions, regulations, pre-*Kazarian* guidance, and federal case law.

Though not specific to DHS or DOS, the following recommendations pertain to changes to the DOL regulations, which, if implemented, would streamline the labor certification process for researchers and academics, thus making the U.S. more attractive to these individuals.

Expand the Special Handling Labor Certification Regulations to include Researchers at National Laboratories. 20 CFR §656.18 sets forth an alternative labor certification procedure for college and university teachers who undergo a "competitive recruitment and selection process." National laboratories engage in similarly robust recruitment processes after which the most qualified researchers are selected for these highly-skilled positions. Given the importance of the

work conducted by national laboratories, the special handling labor certification procedures should be amended to include qualified researchers who will be employed by national laboratories.

Eliminate the Requirement that a Special Handling Labor Certification Application be Filed within 18 Months of "Selection." The requirement that a special handling labor certification be filed within 18 months of selecting the applicant, as found under 20 CFR §656.18(c), is not in alignment with the hiring practices of many colleges and universities. Professors are often hired pursuant to a competitive process, but are not offered tenure-track positions until a couple of years later. By this time, the 18 months have passed and the college or university is put in the uncomfortable position of having to reopen the competitive selection process. As long as colleges and universities are able to show that a competitive process was used to select the best qualified applicant at the time of hire, it should not matter if more than 18 months have passed when the labor certification is filed.

Align the Term "Permanent Position" in the Labor Certification Context with the Definition of "Permanent Position" in the Outstanding Professor/Researcher Category. Many of the world's most talented professors and researchers are hired by colleges, universities, and national laboratories to perform work that is dependent upon continued government funding. Under the current regulatory scheme, these "post-doc" positions are not eligible for the labor certification process because they are not deemed "permanent positions." Redefining the term "permanent" in the labor certification process to include positions where there is a reasonable expectation of continued funding would enable colleges and universities to sponsor more highly-skilled researchers for permanent residence.

Question 8: Attracting the world's most talented entrepreneurs who want to start and grow their business in the United States

Change the Initial Period of Stay for a New Office L Transferee from One to Two Years. 8 CFR §214.2(l)(7)(i)(A)(3) states, "If the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year …" All businesses—especially emerging businesses—need a modicum of predictability in government decision-making to ensure stability of operations. Allowing an intracompany transferee two years to settle into the U.S. and get a business running affords sufficient time for the individual to focus on the growth of the business, find customers, and make new hires without having to worry about whether his or her stay will be renewed. We have seen too many examples of new businesses that close, many resulting in lost U.S. jobs, just when the business is beginning to take off, because a new office extension is denied after one year.

Rescind the Neufeld "Employer-Employee Relationship" Memo. Historically, immigration law has treated a corporation as an entity separate and apart from its shareholders, permitting an owner-entrepreneur to found a corporation and for the corporation to petition for the owner as an employee. The January 2010 Neufeld "employer-employee relationship" memo imposes a far more restrictive standard, making it much more difficult for an entrepreneur to petition for an H-

1B visa.[20] The memo effectively requires an entrepreneur to surrender significant control to an artificially-constructed corporate "board" or other management entity to qualify for H-1B status. Requiring an entrepreneur to surrender control of his or her enterprise is a disincentive to remaining in the United States. USCIS should abandon the rigid construct adopted in the Neufeld memo in favor of more flexible factors for establishing an "employer-employee" relationship that exist elsewhere in the law.

In addition, the Neufeld memorandum greatly restricts the ability of physicians to work in employment situations common in the healthcare industry. For example, USCIS considers an employee of a physician group who provides services at a community hospital to be working at a third party worksite. The memo also makes it extremely difficult for physicians who are employed by a solo practice corporation, which are common in underserved rural areas, to obtain H-1B status.

Develop and Memorialize Special Procedures for the Adjudication of Petitions by Entrepreneurs and Increase Outreach to the Entrepreneurial Community. We were encouraged by the Administration's October 11, 2011 announcement regarding the Entrepreneurs in Residence program. Unfortunately, the momentum behind this initiative has waned and the perception that foreign entrepreneurs and workers at small companies are not welcome continues. H-1B and L-1 petitions filed by innovative small companies are routinely issued onerous requests for inapplicable evidence, and in many cases these petitions are denied. A petitioner's lack of "organizational complexity," inadequate physical premises, and other vague reasons that hint at the petitioner's smallness are often cited as the basis for these denials, whereas petitions filed by larger companies for the same positions are routinely approved.

Though the Entrepreneur Pathways website offers good information on different types of visas for which an entrepreneur may qualify, other aspects of the program have faded into obscurity. For example, on the "Outreach" page, though USCIS says it is "committed to continued engagement with the entrepreneurial community," only one firm engagement from May 2013 is listed and it does not appear that this page has been updated in the past year and a half.[21] In addition, in a May 2013 report on the Entrepreneurs in Residence program, USCIS stated that "a smaller subset of officers at each center received more detailed document-based training and case study workshops … [and] … comprise a specialized core at each service center focused specifically on adjudicating and tracking entrepreneur and startup cases, helping USCIS enhance the consistency and quality of these adjudications."[22] While this is a great step in the right direction, there do not appear to be any published instructions directing entrepreneurs to submit their petitions to these specialized units. An instruction such as this would go far in providing assurances to the entrepreneurial community that their petitions will be given due consideration by a properly trained team. Taking this one step further, USCIS should turn these teams into specialized units (similar to the VSC's VAWA unit) at each service center with which

[20] *See* "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements," AFM Update AD 10-24 (Jan. 8, 2010).
[21] *See* http://www.uscis.gov/eir/outreach.
[22] *See* Entrepreneurs in Residence USCIS Initiative Summary (May 2013) at p. 3-4. http://www.uscis.gov/sites/default/files/USCIS/About%20Us/EIR/EntrepreneursinResidence.pdf.

entrepreneurs would have a direct line of communication to answer adjudicator questions about the unique aspects and complexities of the business, and inquire on case status.

Provide Guidance to EB-2 Adjudicators with Examples of Specific Types of Qualifying "Comparable Evidence" That Are Unique to Entrepreneurs. In addition to making it clear that job creation is a benefit that is *per se* national in scope for purposes of a national interest waiver, USCIS should amend AFM 22.2(2)(C), which lists the criteria for establishing exceptional ability, to provide examples of qualifying "comparable evidence" that would apply to entrepreneurs, such as holding patents or securing financial commitments from outside investors. Adding clarifications to the AFM will help to promote and encourage foreign entrepreneurs to start businesses in the United States, and facilitate the process of adjudicating those petitions.

Question 9: Creating additional immigration opportunities for high-demand professions, such as physicians

Expand "Cap Gap" Relief to Certain Physicians. The majority of H-1B physicians in U.S. residency programs train at non-profit cap-exempt institutions and finish their programs on June 30th, which is the end of the academic medicine year. Because the federal fiscal year does not begin until October 1st, physicians face a three month gap between the end of their training and the start of a cap-subject petition's validity, similar to the "cap gap" problem faced by F-1 students. USCIS should interpret INA §214(n) to allow work authorization as soon as a non-frivolous cap subject H-1B petition is filed and to continue through either the denial date of the petition or the effective date of the approved petition. This relief will help underserved communities have access to physicians more quickly and is in line with previous administrative relief offered to F-1 students converting to H-1B status.

Fix the H-1B/Medical License Problem. Many physicians who must complete their graduate medical education in H-1B status face a "Catch 22" situation: They are ineligible to apply for an unrestricted medical license until their training is complete, yet they must file an H-1B transfer petition before training is complete to preserve their immigration status. USCIS should expand the May 20, 2009 Velarde memo to allow for filing of an H-1B petition in situations where the physician is legally ineligible to obtain a medical license and be granted the full three year period.[23]

End the Application of INA §212(e) to J-2 Spouses and Children. INA §212(e) imposes a two year home residency requirement on certain J-1 exchange visitors. Though the statute does not extend this requirement to the spouses and children of J-1s, USCIS takes the position that it does, and as a result, won't let J-2 dependents change status to anything other than H-4 during the J-1's §214(l) 3-year service obligation. DOS and USCIS must adopt a more generous and appropriate reading of the statute to recognize that 212(e) does not apply to J-2 spouses. Alternatively, USCIS should end its practice of prohibiting a J-2 spouse from changing status to H-1B after a J-1 waiver is granted. INA §212(e) *permits*, but does not *mandate* a change of status to H-4, therefore, a J-2 should not be prohibited from changing status to any other nonimmigrant category. The current practice is impractical and has a particularly negative impact on the

[23] "Requirements for H-1B Beneficiaries Seeking to Practice in a Health Care Occupation" (May 20, 2009).

foreign physician community, 80% of whom train in J-1 status. The practice is also tremendously disruptive and expensive for J-2 professionals, many of whom are also physicians who are willing to provide care in underserved communities. USCIS's flawed approach can therefore delay or deny access to needed health care services.

Reform the Physician National Interest Waiver (PNIW) Program. Under INA §203(b)(2)(B)(ii) and the *Schneider v. Chertoff* decision, it is well-established that a physician may complete a portion or all of his or her 5-year clinical service requirement before filing a PNIW petition. Therefore, USCIS should interpret the definition of "required period of clinical medical practice" referenced in 8 CFR §204.12(c)(1) to include only the balance of time that has not yet been completed at the time of filing the PNIW petition. Further, contrary to current practice, USCIS should accept any reasonable combination of evidence that demonstrates the physician's satisfaction of some or all of the clinical service requirement and his/her intention to complete the balance of the five years (if any) after the PNIW is filed. For example, USCIS currently requires an employment contract dated within 6 months of filing the PNIW petition even though the physician may have completed some or all of the five years of clinical service long before filing. The requirement that the PNIW be accompanied by a public interest letter (from the VA facility or state department of health) dated within 180 days of filing is inappropriate for the same reason. If a portion or all of the 5-year clinical service was completed before filing the PNIW petition, the physician should be able to file with evidence of the time already served, *plus* an employment contract or self-employment attestation for the *balanc*e of time. This is consistent with both the statute and the regulation and would be an easy way to improve the PNIW program.

USCIS should also issue "completion letters" to all physicians who have provided satisfactory evidence that the 5-year commitment has been fulfilled. USCIS is inconsistent in the issuance of such letters, and generally only does so for physicians who are able to file applications for permanent residence. This letter is an easy administrative benefit that would facilitate the ability of physicians who have fulfilled the commitment, but who are unable to adjust due to immigrant visa backlogs, to move on to other employment opportunities.

Clarify that Physicians Need Not Serve the J-1 Waiver Obligation in H-1B Status. INA §214(l)(2)(a) states that "notwithstanding section 248(a)(2), the Attorney General *may* change the status of an alien who qualifies under this subsection and section 212(e) to that of an alien described in section 101(a)(15)(H)(i)(b)" (emphasis added). USCIS has interpreted this as *requiring* a physician who receives a J-1 waiver to serve in H-1B status. USCIS takes the position that time spent in other visa categories, even if the doctor is meeting all service obligations, will not count toward satisfying the J-1 waiver requirements. However, as long as the doctor is fulfilling his or her J-1 waiver service requirement, the doctor's visa category should be irrelevant. USCIS must clarify that physicians may work in any employment authorized status and not just H-1B status.

Clarify the "Agrees to Begin Employment" Provision in INA §214(l)(1)(C)(ii). INA §214(l)(1)(C)(ii) states that "the alien agrees to begin employment with the health facility or health care organization within 90 days of receiving such waiver." The purpose of this provision is to ensure that physicians begin working for the employer sponsor promptly upon approval.

However, because many states require J-1 waiver applications to be filed in September and October, it is not always possible for the physician to start work within 90 days of the waiver approval because he or she will still have well over 90 days of required J-1 training to complete. Because the statute says the alien "agrees to begin" rather than "will begin," USCIS can simply interpret the provision to mean that the doctor will commence the J-1 waiver commitment when training is complete and the physician has obtained the necessary work authorization.

Reform the Veterans Administration J-1 Waiver Program. The VA J-1 waiver program drives good candidates away by requiring advertising for the position each time a physician needs an H-1B extension or seeks permanent residence. This means that the physician's job is called into question at multiple times during his or her career. That the VA struggles to find qualified doctors is common knowledge. Therefore, the administration should work with the VA to end the expensive and burdensome process of recruiting before each new immigration application.

Expand the HHS Clinical Waiver Program. The HHS waiver program is only open to community health centers, rural health clinics, and Native American/Alaskan Native tribal member facilities. We suggest that the program expand to serve hospitals and individual medical practices. The HHS program requires an HPSA score of 07, so any hospitals or physician practices would still be required to demonstrate a severe physician shortage before benefitting from the program. In addition, since HHS is already responsible for providing physician services to federal prisons and immigration detention facilities, we recommend that it expand its J-1 waiver program to include physicians and contractors serving such facilities due to the difficulties they encounter when recruiting doctors. This would help ensure that the U.S. Public Health Service is able to achieve its mission to provide prisoners and detainees with needed health care services.

<u>Question 10</u>: Policy and operational changes to the EB–5 immigrant investor visa program

Assemble a Working Group Comprised of Outside EB-5 Experts to Inform the Development of EB-5 Regulations and Policy, and Increase EB-5 Stakeholder Engagements. On April 24, 2014, USCIS announced that it was beginning work on revised EB-5 regulations and held a stakeholder teleconference to receive feedback from the public on such changes. The laws and regulations surrounding the employment-based fifth preference immigrant investor classification are among the most complex of our immigration system. Therefore, it is critical that USCIS implement a system to receive regular, targeted feedback from a diverse group of experts in the EB-5 stakeholder community. This would be best accomplished through the establishment of a targeted working group.

Improve Overall Processing Times and Implement Premium Processing for Certain I-924 and I-526 Petitions and Create an Exemplar I-829 Process. USCIS must take immediate steps to reduce overall processing times for all EB-5 related petitions and applications. USCIS also should implement premium processing for I-924 petitions that involve projects that are ready to immediately accept investors but for delays in USCIS adjudications. These are projects where the specifications and site location are finalized, a detailed business plan is completed, and specific offering documents are ready to be executed. This would include both initial and

subsequent I-924s that include a project pre-approval request, but not subsequent I-924s that seek to amend the regional center designation. USCIS should also implement premium processing for the adjudication of an investor's I-526 petition, where business realities require the use of investor funds to be contingent upon approval of the I-526. Finally, USCIS should create an I-829 exemplar process to permit adjudication of all issues relating to the project prior to and separate from issues relating to the individual investors. This will help smooth processing inefficiencies in the current I-829 process.

Permit Investors to Associate with a Regional Center through Form I-526 and Group I-924 Regional Center Petitions with Associated I-526 Petitions to Facilitate Adjudications. The vast majority of I-526 petitions are associated with regional centers. Despite this, the current form I-526 petition solicits no information about the associated regional center. The form would also be improved by adding a section requesting information about any affiliated exemplar or amendment filing. Including this information in the form would help adjudicators quickly connect the I-526 to the underlying I-924 file. Once associated, all related I-526 petitions should be grouped with the regional center's I-924 to facilitate the adjudication process. Replies to I-924 RFEs could then be made part of the record for all associated I-526 petitions so that individual RFEs requesting the same or similar documentation for the I-526 petitions could be avoided.

Prioritize the Implementation of Improvements to I-526 Adjudications in USCIS ELIS and Expand ELIS to Encompass Additional Aspects of the EB-5 Process. In 2013, USCIS launched the I-526 as the first EB-5-based form on its electronic filing system, ELIS. In 2014, USCIS launched the ELIS Document Library tool, which allows designated library managers for Regional Centers to store online documents associated with investments in new commercial enterprises and supplement an electronic or paper-based I-526 petition with documents stored in the online library. Given that I-526 petitions regularly include thousands of pages of documents concerning investment projects and job creation, the release of these two electronic benefits is a step in the right direction. Unfortunately, initial users reported that the system was slow to upload documents, cumbersome, and prone to crashing. In August 2014, USCIS made some welcome improvements to the I-526 and Document Library, though many problems continue to persist. Thus, there is no specific benefit to choose ELIS over paper filing, such as faster processing times. Given the sheer volume of paper associated with EB-5 filings, USCIS should continue to prioritize improvements to the I-526 ELIS process and Document Library, while looking to expand ELIS to include I-924 exemplar filings and allow RFE replies to be uploaded into the Regional Center's Document Library as they relate to project eligibility. As USCIS continues to roll out improvements and new ELIS initiatives relating to EB-5 adjudications, it should also increase its outreach to the EB-5 stakeholder community for beta testing and to encourage EB-5 filers to embrace ELIS as a viable tool.

Create a Channel for Direct Communication with the Immigrant Investor Program Office to Resolve Issues That Don't Necessitate an RFE. As reported by the CIS Ombudsman following a March 5, 2013 stakeholder meeting on the EB-5 program, "[s]takeholders seek more direct communications with adjudicators via telephone and email."[24] Specifically, USCIS should create a means for attorneys and Regional Center representatives to communicate directly with the IPO

[24] *See* http://www.dhs.gov/sites/default/files/publications/cisomb-EB-5-meeting-summary_0.pdf.

on routine matters that could be easily resolved without the issuance of an RFE, emergency situations, and to check on the status of cases that are pending past the IPO posted processing times. The lines of communication should work both ways—USCIS adjudicators should be encouraged to reach out to the attorneys and Regional Center representatives by phone and e-mail when questions arise, and attorneys and representatives should likewise be able to contact the IPO to initiate inquiries on urgent matters and long-pending cases.

Question 12: Refining and updating DOL occupational categories, descriptors, and/or data to better align the prevailing wage process for visas with the evolving job market

An important part of DOL's mission is to ensure that the employment of a foreign national worker will not negatively impact the wages of a similarly employed U.S. worker. We strongly support these and other principles designed to protect all of those engaged in the U.S. workforce, and believe that no one should be paid below-market wages. However, the current PWD process often results in wage requirements that are skewed in the opposite direction, thus requiring employers to pay a foreign national worker a wage that is well above the market rate. This increases employer costs substantially and can ultimately force employers who must rely on foreign national workers to move projects abroad. The following examples illustrate the problems with the current PWD process:

Misclassification of Jobs into the Wrong Standard Occupational Classification

Under the current system, employers submit a job description and list of educational and experience requirements to the National Prevailing Wage Center (NPWC), which reviews that information and assigns the position to a particular occupational code and skill level (ranging from entry-level to very experienced). This is typically done through the BLS OES system. Unfortunately, positions are often misclassified into incorrect occupational categories and assigned skill levels greater than that which is dictated by DOL's 2009 Prevailing Wage Determination Policy Guidance.[25]

This commonly occurs with positions in the IT sector. For example, if a technology position involves even minimal supervision of junior workers or portions of projects, the NPWC will often classify the position as a Computer and Information Systems Manager (11-3021.00), a category that is intended to encompass Chief Information Officers and other senior technology management positions. This error can result in a salary differential of $20,000 or more. Many large companies spend hundreds of thousands of dollars annually on salary benchmarking to ensure that they are paying wages to all of their employees that are competitive within the market. These employers strive to pay each worker with similar background experience and job duties at the same salary level. The conclusion by the NPWC that these companies are significantly underpaying a foreign national worker is simply not based in reality.

[25] *See* Employment and Training Administration, "Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs," (*revised* Nov. 2009), *available at* http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

Rejection of Valid, Industry-Standard Prevailing Wage Surveys

Under 20 CFR §656.40(g), employers may use scientifically-valid independent compensation surveys, such as Radford, Mercer, and Towers-Watson, as an alternative to the OES wage survey. Independent compensation surveys are extremely valuable tools for employers in setting employee wage levels because they tend to be based on very detailed data, with added levels of education, experience, and other relevant factors to allow differentiation between real-world career stages. Surveys such as these are so accurate and reliable that many employers, especially in highly competitive geographic areas like Silicon Valley, pay thousands of dollars per survey to ensure that their compensation packages remain competitive.

Even though the regulations allow these surveys, the NPWC frequently rejects them for what appear to be generalized and often ill-defined reasons, such as the conclusion that the job description in the survey is not a sufficient "match" for the job description provided by the employer. Companies use these surveys not to pay a foreign worker a below-market wage, but rather to treat all of their workers consistently, fairly, and in a manner that is competitive to the market. DOL should accept commercial wage surveys as a valid basis for justifying a prevailing wage.

Mismatch Between the OES Survey and Modern Occupations

The occupational categories available in the OES wage survey are controlled by the Standard Occupational Classification (SOC) system which the BLS has not updated since 2010, and which is not scheduled to be updated until 2018. Meanwhile, modern business practices have continued to grow and evolve, and changing workplace realities have led to the emergence of job categories that did not exist in 2010. Though BLS periodically adds emerging occupations to the "All Other" SOC classification, and many times these new occupations have detailed descriptions that accurately depict the position in question, DOL often refuses to rely on the "All Other" classification for prevailing wage purposes, stating that such classifications lack adequate wage data.

If DOL is hesitant to rely on the "All Other" classification when issuing PWDs, BLS should review the occupations listed under the "All Other" classifications on a regular basis and move such occupations to their own classification as soon as BLS is comfortable with the reliability of the data. This review should take place on an ongoing basis and should not depend on a revision of the entire SOC that occurs every 8 to 10 years. By allowing these occupations to languish in the "All Other" category, employers are inappropriately being held to prevailing wage standards that do not reflect the job duties the employee is actually performing. A frequent assessment and transition of "All Other" occupations to their own distinct category would greatly improve the degree to which the SOC reflects the modern U.S. workforce.

Unsubstantiated Wage Differentials for Positions Requiring a Foreign Language or Travel

If a position requires the employee to have knowledge of a foreign language or to travel, and such a requirement is not normal to the occupation, DOL generally adds a wage level to the PWD. In other words, if the position would normally be assigned a Level 2 wage, a foreign language or travel requirement increases the wage to a Level 3. For professional positions, it is not uncommon for each wage level to represent an increase of 20 percent or more. If the

position requires knowledge of a foreign language *and* travel, DOL generally adds two levels to the PWD, representing a wage differential that is often 40 percent or greater. These wage differentials are not in line with the actual compensation practices of U.S. employers.

Moreover, when surveying employers to collect wage data for the DOL's prevailing wage database, BLS does not ask whether employers pay higher wages for positions that involve a foreign language or travel. As such, the wage differentials are unsubstantiated by real world data and have a punitive effect on employers seeking to expand in the global marketplace. Unless DOL finds that foreign language and travel requirements not normal to the occupation actually result in wage differentials, employers should not be forced to pay significantly higher wages for these jobs.

Question 14: Combatting waste, fraud, and abuse in the legal immigration system

First and foremost, USCIS must implement an approach to its fraud detection efforts that is fair and reasonable, and which takes into account the realities of human error and constantly evolving real world practices. Reports and data released by USCIS often conflate errors on applications and the submission of non-traditional supporting documentation with fraud. Given the length and complexity of the immigration forms and instructions, and the constantly moving target as to what is required by way of documentation and standards, mistakes are inevitable. Without sufficiently accounting for technical and other errors, the agency's statistics and reporting on the rate and frequency of fraud in benefits applications is meaningless. USCIS must clearly differentiate and articulate the difference between "fraud," and "error" and indicate the proportions of its statistics that are attributable to each. Unfortunately, statistics that include both are frequently cited as proof of fraud.

In addition, waste is epidemic in the ongoing search for fraud. Excessive and repetitive RFEs are explained as being part of fraud prevention, but rarely if ever contain an explanation of what specifically is being questioned, much less how to address the concern. Random site visits appear to be aimless and more akin to the filling out of a routine checklist by someone who lacks enough knowledge or insight to identify whether actual fraud might be present. In other words, rather than a reasoned, strategic approach to uncovering fraud, efforts appear to be random and misguided. Therefore, AILA recommends that USCIS engage the services of investigators or consultants familiar with business operations to advise on what is commonplace in the industry, what is unusual but realistic, and what might raise red flags.

Ensuring Use of All Immigrant Visa Numbers

Question 15: Ensuring that all of the immigrant visa numbers that Congress provides for and intends to be issued each year are allocated going forward

The current system of immigration preferences is intended to promote family unification and to bring more workers with needed skills into the United States to bolster the economy. Though this system was intended to improve the backlogs created by the prior system, the current practice of counting derivatives individually against the numerical limitations on family-based, employment-based, and diversity visa categories frequently undermines these family and

employment goals. The Immigration Act of 1990 (IMMACT90) deleted the statutory language that previously compelled the current practice of counting derivatives. To date, however, the government has continued to count spouses and children individually. DOS and DHS should implement an alternative counting practice that would assign a single visa number to each family unit. This is consistent with the language of IMMACT90 and would more effectively achieve Congress's underlying goals.

USCIS should also take steps to improve data collection and data sharing with DOS to improve "visibility" of petitions and applications pending at USCIS so that DOS can better predict demand for visas and visa allocation across all preference categories. This should include the development of capabilities to track work in progress as well as multiple visa applications for the same individual.

Question 16: Allocating immigrant visa numbers that Congress provided for and intended to be issued, but were not issued in past years.

As reflected in INA §201, Congress clearly indicated its intent to ensure that no available immigrant visa number should go unused. The statutory scheme sets forth a system whereby unused employment-based visas are to be passed to the family-based category and unused family-based visas are to be passed over to the employment side. Moreover, under INA §203, unused numbers within each of the family- and employment-based preferences trickle down to the next preference within the broader categories. Yet despite this clear mandate, it is reported that approximately 220,000 family and employment-based visas have gone unused, most of which can be attributed to the period between 1992 and 1997. Although recapture of unused numbers has previously been accomplished through congressional action, the INA does not specifically prohibit the State Department from exercising its authority to recapture unused visas on its own. Moreover, cases indicating that recapture is not possible are limited to or based on recapture of visas under the DV lottery. Unlike the family- and employment-based preference scheme, there is no congressional mandate for unused DV lottery numbers to be carried over to the employment-based or family-based categories or vice versa.

Modernizing IT Infrastructure

Question 17: Elements of the current legal immigration system that are most in need of modernized IT solutions and changes that would result in the most significant improvements to the user experience

Establish Standard Procedures for Effective Communication with Each Embassy and Consular Post and Publish This Information on the Individual Post Webpages. Difficulties communicating electronically with posts and ensuring secure document delivery to consular sections continue to be two of the most common concerns expressed by AILA members. A review of the Bureau of Consular Affairs website and several randomly selected embassy and consulate web pages reveals a wide disparity in the availability of reliable contact information and preferred methods of communication. Post-specific procedures can also change suddenly with the arrival of new managers, leaving counsel and clients confused and unable to establish contact with key personnel on time-sensitive matters or unable to flag cases where factual issues

may require clarification or errors may have occurred. While we understand that resources and other challenges vary greatly from post to post, standardized communication procedures would be mutually beneficial for both DOS and its stakeholders. Such procedures could include the creation and use of e-mail addresses specific to each consular unit and a dedicated fax number or e-mail for the transmission of documentation that guarantees receipt in the consular section itself. Because there will always be situations where it is essential for consuls and counsel to be able to discuss difficult or time-sensitive cases by phone, the procedures should also include criteria for requesting telephone communication while safeguarding against the abuse of excessive requests.

Continue to Improve myUSCIS, Including the Case Status Information Portal. We commend USCIS for its ongoing efforts to update and improve the customer experience on its website. After some initial bumps in the roll-out in late 2014, the new "myUSCIS" Case Status Online features a number of improvements over the prior "CRIS" system. USCIS should continue to build on these initial efforts by incorporating more case-specific information for users who create an account. For example, the current Case Status Online system tells us if an RFE, NOID, or denial has been issued, but a welcome addition would be the ability to access electronic versions of those documents through the system, rather than waiting for the document to arrive in the mail. In addition, attorneys should be able to submit an online change of address when they move offices, and confirm whether their G-28 has been accepted and they are recognized as the attorney of record on a particular matter. It would also be helpful to include the current location of a file (including whether a file is in transit), and incorporate current and accurate processing times into the system thus allowing applicants, petitioners, and attorneys to timely inquire on cases that remain pending outside normal processing times. By bringing greater transparency to the adjudication process through the Case Status Online system, USCIS will conserve resources by reducing the volume of calls received through its National Customer Service Center.

Deploy a System to Accept Credit Cards for Payment of USCIS Filing Fees. In his November 20, 2014 memorandum, "Policies to Promote and Increase Access to U.S. Citizenship," DHS Secretary Johnson directed USCIS to begin accepting credit cards as a payment option for the naturalization fee. This initiative should be expanded to include all other form types.

Seek Input from Large-Scale Users, Such as Attorneys, and Vendors as USCIS Continues to Transition from a Paper-Based to an Electronic-Based Environment. At present, the Electronic Immigration System (ELIS) may be used for three functions: (1) Filing Form I-539, Application to Change/Extend Nonimmigrant Status for certain individuals; (2) Filing Form I-526 Immigrant Petition by Alien Entrepreneur; and (3) Payment of the USCIS Immigrant Fee. Based on feedback from AILA members, there are many obstacles to attorney use of ELIS that are not present when filing on paper. As a result, few attorneys use ELIS. In addition, attorneys are unable to pay the USCIS immigrant fee on behalf of their clients. As USCIS continues to develop ELIS and expand its functionality to other forms and uses, it would be in the agency's best interest to reach out to vendors and large-scale users, including AILA, for regular usability testing and feedback. Input from stakeholders before rolling out new features has thus far been inadequate.

Question 18: The most valuable government collected data and metrics that should be made public to improve oversight and understanding of the legal immigration system

Improve USCIS and DOS Transparency through the Publication of Regular, Meaningful Statistics and Processing Times. The USCIS "Immigration and Citizenship Data" webpage is woefully inadequate, particularly when it comes to statistics on employment-based petitions and applications. The only category that is regularly updated in the employment-based category is H-2A agricultural workers.[26] On the archive page, there is only limited data from 2011 and 2012 on H-1Bs, L-1Bs, and I-140s. A separate page with statistics on the total number of petitions and applications received by the agency and N-400 naturalization applications was last updated in May 2013.[27] Though DHS reports annual statistics on nonimmigrants, this report focuses on nonimmigrant admissions, as opposed to RFE rates and rates of petition approval and denial by USCIS. USCIS must improve transparency in its adjudications by publishing timely and regular statistics on adjudications of all petition and application types.

In addition, current processing times that are posted on the USCIS website are based on data that is approximately 45 days old as of the date of publication, thus rendering the processing times practically meaningless. Also, it is widely reported that the NCSC does not rely on these published processing times when it fields a case status inquiry from the public. If the internal, unpublished processing time is longer than that which is posted on the USCIS website, NCSC will refuse to initiate the case inquiry. USCIS must move to publish timely and accurate processing times on its website and ensure that NCSC contractors rely solely on those processing times for case inquiries from the public.

The statistics available on DOS's website are much more comprehensive, but with certain exceptions, focus primarily on visa issuance, with less information on refusal rates. DOS should publish nonimmigrant and immigrant visa refusal and approval numbers for each post.

Conclusion

AILA appreciates the opportunity to comment on this notice, and we look forward to a continued dialogue with DHS, DOS, and other agencies on issues concerning this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[26] *See* http://www.uscis.gov/tools/reports-studies/immigration-forms-data.
[27] *See* http://www.uscis.gov/tools/reports-studies/applications-benefits-and-naturalization-monthly-statistical-reports/additional-monthly-statistics-reports.