Specialty Occupation as Described in VSC H-1B Guide

"Specialty Occupation" Criteria

8 CFR 214.2(h)(4)(iii)(A) requires for H-1B petitions involving a "specialty occupation" that the position meet one of the following criteria:

A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that only an individual with a degree can perform it;

The employer normally requires a degree or its equivalent for the position; OR

The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

NOTE: It is not sufficient that the position merely requires attainment of a bachelor's degree. The degree must be in a "specific specialty" and must be required so that the employee may apply a "body of highly specialized knowledge" to the occupation. The key factor is whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the INA. [Section 214(i)(1) of the INA]

Industry-wide Standards

In addition to the above-listed criteria, USCIS will look to industry-wide standards to determine whether a position is a specialty occupation, and whether a bachelor's degree in a specific specialty is normally the minimum prerequisite for the position.

In certain professions, it will be very clear that this is the case. For example, a bachelor's degree in Accounting is normally a minimum prerequisite for a Certified Public Accountant position with an accounting firm. In a case where a bachelor's degree is less directly related to the occupation in question, it would be beneficial for the petitioner to list:

Relevant course work of the beneficiary in order to further establish the direct relevance of the degree to the position, and

Show that the position is indeed professional in nature.

Job Duties

While both the job and the beneficiary must meet the above stated requirements, the mere fact that the beneficiary meets the requirements of the position does not necessarily mean that the duties to be performed require an individual of that caliber.

The petitioner must provide a detailed description of the job duties to be performed.

Occupational Outlook Handbook

If the detailed description does not persuade you that the job offered meets the requirements of a "specialty occupation", useful guidance may be found in the Reference Library or on-line. A good reference is the Department of Labor's Occupational Outlook Handbook (OOH). The OOH outlines the duties normally performed and basic educational and experience requirements.

- The OOH may be accessed through the Internet at the following location: http://www.bls.gov/oco/home.htm

- The OOH may also be accessed from the VSC Adjudications ECN page under the Reference Link.

When using the OOH, make sure the job title researched accurately reflects the job duties to be performed. Look at each case individually; do not get in the habit of classifying "job titles."

POSITION REQUIREMENTS from VSC H-1B Training

Job Criteria 8 CFR 214.2(h)(4)(iii)(A):

1. Bachelor degree is normally minimum requirement;
2. Degree requirement is common to industry or position so complex/unique that it requires the associated degree;
3. Employer normally requires; OR
4. Nature of employer's duties so specialized and complex.
5. It is not sufficient that the position merely requires attainment of a bachelor's degree.
   The degree must be in a "specific specialty" and must require the theoretical and practical application of a body of highly specialized knowledge as minimum for entry into the occupation.
6. The petitioner must provide a detailed description of the job duties to be performed.
7. You may request a description in non-technical terms.
8. You should consider all information provided when making your decision.

Determining Specialty Occupation

1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

- Refer to the Occupational Outlook Handbook for a
- description of the typical duties and the education
- and experience requirements associated with the
- position.

2) The degree requirement is common to the industry in parallel positions among similar organizations or the position is so complex or unique that it can be performed only by an individual with a degree

- Common evidence may include job postings for
- similar positions within other companies, expert
- opinion letters or evidence from the petitioner to
- explain how their position is unique or complex.

3) The employer normally requires a degree or its equivalent for the position.

- Sufficient evidence could include copies of
- payroll records and degrees of all
- employees that hold/have held the position,
- or other company records.

4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

- Sufficient evidence may include expert
- opinion letters or evidence from the petitioner to
- explain how their position is unique or complex.

Sections of the VSC H-1B Guide: Foreign Degree Equivalency Assessing Education/Specialized Training/Progressively Responsible Experience

Foreign Degree Equivalency

Because many beneficiaries are educated outside the United States, you must ascertain whether the beneficiary's foreign education is equivalent to a U.S. degree. Just because the degree says it is a bachelor's degree does not necessarily mean that it is equivalent to a U.S. bachelor's degree. Therefore, professional education evaluations are often used to determine the level of education attained by the beneficiary.

Education Only Evaluations

An advisory evaluation of the beneficiary's credentials may be necessary to determine the level and major field of educational attainment, in terms of equivalent education in the United States.

USCIS will only accept evaluations from credentialing companies when they are evaluating education only. Normally, evaluators from these companies do not have the authority to grant college-level credit in the specialty at an accredited college or university, which has a program for granting such credit based on an individual's training and/or work experience pursuant to 8 CFR § 214.2(h)(4)(iii)(D)(1). The scope of an evaluation from a credentialing company is limited to evaluating education only, not training or work experience.

NOTE: USCIS does not endorse or recommend evaluators. Many private individuals, organizations and educational institutions provide this service.

Education Evaluation Requirements

An acceptable evaluation of formal education should:

- Consider formal education only, not practical experience,
- State if the collegiate training was post-secondary education, i.e., whether the applicant completed the U.S. equivalent of high school before entering college,
- Provide a detailed explanation of the material evaluated rather than a simple conclusive statement, and
- Briefly state the qualifications and experience of the evaluator providing the opinion.

Formula

Refer to the table below for the general formula to apply in determining education equivalence:

To be equivalent to the following education:	The beneficiary must have the following experience:
Any college education credit	Specialized training or work experience must be in a professional position
one year college credit	3 years
a bachelor's degree	12 years
master's degree	bachelor's + 5 years
PhD	no substitute

IMPORTANT: Ordinary experience alone cannot be equated with a college degree. Experience, which is substituted for education, must include the theoretical and practical application of specialized knowledge required at the professional level of the occupation. It cannot be concluded that any on-the-job experience related to a professional activity may be substituted for academic education. [*See Matter of Sea, Inc.*, 19 I&N Dec. 817]

Evaluator Requirements for Combination Evaluation of Education and Experience

USCIS will only accept evaluations of a combination of education, training and/or work experience if the evaluator meets the requirements of 8 CFR 214.2(h)(4)(iii)(D)(1) in that he or she has the authority to grant college level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

If the evaluator of a credentialing company also meets the requirements of 8 CFR 214.2(h)(4)(iii)(D)(1), then USCIS would find the evaluation acceptable for consideration.

NOTE: Evaluations are advisory in nature. USCIS may still disagree with the finding.

Criteria for Professional Evaluation of Education and Experience

A professional evaluation of education and experience must meet certain criteria to be useful to USCIS. An evaluation should consider that:

1. The beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty.
2. The claimed experience was gained while working with peers, supervisors, and/or subordinates who have a degree or equivalent in the specialty.
3. The beneficiary has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

Recognition of expertise in the specialty occupation by at least two recognized authorities in **the same specialty occupation**,
Membership in a recognized foreign or United States association or society in the specialty occupation,
Published material by or about the alien in professional publications, trade journals, or major newspapers,
Licensure or registration to practice the specialty occupation in a foreign country, or
Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

[8 CFR 214.2(h)(4)(iii)(D)(5)]

Officer's Determination

Ultimately, the officer makes the final determination that the equivalent of the degree required by the specialty occupation has been acquired:

Through a combination of education, specialized training, and/or work experience in areas related to the specialty, and
The alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

From:
Sent: Friday, June 14, 2013 5:30 PM
To:
Subject: RE: H1B Evaluator question

The regulatory requirement at 8 CFR 214.2(h)(4)(iii)(D)(1) for an evaluation from someone who has the authority to grant college level credit only applies in cases where the beneficiary is trying to qualify for the offered job through a combination of education, vocational training and/or experience. An evaluation of foreign education only may be made by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials pursuant to 8 CFR 214.2(h)(4)(iii)(D)(3).

With that being said, if we have reason to question the evaluation service regarding its qualifications to make the evaluation, we are not precluded from asking. In fact, 8 CFR 214.2(h)(4)(ii) states that an opinion from a recognized authority must state:
(1) The writer's qualifications as an expert;
(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;
(3) How the conclusions were reached; and
(4) The basis for the conclusions supported by copies or citations of any research material used.

Commonly Seen EE Scenarios 12/17/13

SCENARIO (Each scenario is inclusive of only the documentation listed.)	RFE	COMMENTS
RTC Established for the Validity Period Requested		
The record contains sufficient evidence to establish RTC such as the following: beneficiary had been working overseas for an entity of the petitioner, there is an employment contract between the petitioner and the beneficiary showing a sign-on bonus for relocating to the United States, relocation expenses, medical, dental, and 401K benefits. There is no end client validation. There is no history of fraud or fraud indicators. Added 09/05/13	N/A	The totality of evidence establishes RTC. Approve for the time requested. Added 09/05/13. Revised 12/16/13.
There is evidence of continued employment with the petitioner, evidence of medical, dental, and 401K benefits to establish RTC. There is also an MSA that is more than five years old and is not supported by a recent end client letter or work order. For example, the MSA is six years old and is open-ended, or the MSA is expired, and there is no work order or end client letter to cover the dates requested. There is no history of fraud or fraud indicators. Revised 09/05/13 and 12/16/13		
There is evidence of continued employment with the petitioner, evidence of medical, dental, and 401K benefits to establish RTC. There is an MSA that refers to a SOW, but no SOW is in the record. There is no history of fraud or fraud indicators. Added 12/16/13		
The record contains sufficient evidence to establish RTC and the end client documentation, such as an MSA, is open ended. There is no history of fraud or fraud indicators. Revised 07/10/13 and 12/16/13		
RTC Established for a Limited Validity Period		
The record contains sufficient evidence to establish RTC. There is an end client letter or other end client documentation specifying the period of work, even though the MSA may appear open ended or is one that will expire during the dates specified in the end client letter. Revised 07/10/13 and 12/16/13	N/A	Approve for the amount of time RTC has been established or 1 year, whichever is greater (as long as otherwise approvable).
RTC Not Established		
The record contains a heavily redacted contract. The scope, terms, and validity are redacted. No other evidence of right to control provided. Revised 07/10/13 and 12/16/13	2100, 2110, modified 2103 or 2104	RTC not established. Send RFE addressing that RTC is not established for the validity period requested because of the redacted information.

Commonly Seen EE Scenarios 12/17/13

There is an MSA that is more than five years old and is not supported by a recent end client letter or work order. For example, an open-ended MSA is six years old, or the MSA is expired, and there is no work order or end client letter to cover the dates requested. No other evidence of right to control is provided. Added 12/16/13	2100, 2110, and modify 2103 or 2104.	RTC not established. Send RFE. Identify the documents provided, the dates issued, and explain that the MSA is expired or that the MSA was executed more than 5 years ago and it is not evident that the agreement is still valid.
The petition and LCA indicate the address where the beneficiary will be placed but there is no other info about the employer at that address. No evidence of right to control is provided. Revised 12/16/13	2100, 2110 insert 2101	RTC not established. 2101 address the fact an address has been provided but no other evidence to indicate who the employer at that address is.
The petition and LCA indicate the beneficiary will be placed directly at an end client but no other info about employment with the end client. No evidence of right to control is provided. Revised 12/16/13	2100, 2110 insert 2102	RTC not established. 2102 addresses the name of the end client provided and that no evidence was submitted to establish RTC.
The petition, LCA and support docs indicate the beneficiary will be placed at a named end client through one or more vendors. The record contains no info from end client. No evidence of right to control is provided. Revised 12/16/13	2100, 2110 insert 2104	RTC not established. 2104 address the name of end client, acknowledges the vendor and indicates there is no evidence of RTC with end client.
Other Scenarios		
Petitioner specifically indicates beneficiary will work on an in-house project but no evidence submitted to document the project, or the description of the work/project is not persuasive compared to information about the company. Note in-house projects do not mean an automatic RFE. Revised 10/23/13 and 12/16/13.	2100, 2135	2135 requests evidence to establish sufficient specialty occupation work for the requested period. This should be applied to IT/IT and SOF filings. N/A to large H1B dependent companies.
The petition and LCA indicate the beneficiary will work at the petitioner's location. The nature of the petitioner's business is consulting and providing clients with their IT needs. The beneficiary's duties are vague and mention "user" or "client" needs/requirements.	2100, 2109, 2135, 2110	2109 should be modified to indicate the itinerary is unclear based on nature of business and beneficiary's duties; 2135 add that the petition and LCA indicate the beneficiary will work in house; 2110 add lead in to state based on nature of business and beneficiary duties it appears the beneficiary may be placed off site.
Self-Petitioner	Send to EIR Group	Send to the EIR Group. 2118 is the self-petitioner RFE. Officers should also be sure to address specialty occupation, if applicable.
General Information regarding additional standards used with RTC		
**For same/same filings	2119, 2107	2119 to address the fact it is same/same but additional evidence is needed; 2107 for maintenance of prior EE relationship when applicable.

	2101	Insert for 2110 when an address or city and state has been provided but no other information regarding the employer at that address.
	2102	Insert for 2110 when the petitioner has indicated a direct end client, but provided no documentation to establish RTC with the end client
	2103	Insert for 2110 when the petitioner has submitted documentation from the end client, but the documentation does not establish RTC.
	2104	Insert for 2110 when the petitioner has indicated a vendor(s) and the end client, but provided no documentation to establish RTC with the end client

Sections of the VSC H-1B Guide on Validity Periods

Cap Exempt Concurrent Employment

USCIS does not require that an alien who is cap-exempt be counted towards the cap if they accept concurrent employment with a non-exempt employer. [Section 214(g)(6) of the INA]

As soon as the alien is no longer employed by the cap-exempt employer, that alien will then be subject to the cap.

Documentary evidence, such as a current letter of employment or a recent pay stub, should be provided in support of such a concurrent employment petition at the time that it is filed with USCIS in order to confirm that the H-1B alien beneficiary is still employed in a cap-exempt position.

The validity dates on the concurrent employment petition may be granted for the time requested and do not need to be limited to the dates of the cap-exempt employment.

[*See* Neufeld Memo of May 30, 2008, *Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277*]

Admission as a "new" H1B alien or readmission for remainder of 6-year period.

Refer to the table below to determine if the alien is seeking admission as a "new" H1B alien or readmission for remainder of the 6-year period.

If the alien is seeking...	**And the petitioner...**	**Then the alien is eligible for...**
Admission as a "new" H1B alien, **NOTE:** The alien is subject to the H-1B	• DID NOT complete parts C-1-d and C-3-g of the I-129 H-1B Data Collection Supplement and • Provided documentation to establish that the alien has been, or will be, outside the United States for more than one year as of the requested start	The full six year validity period.

CAP unless he or she otherwise qualifies for a cap exemption.	date… NOTE: Although INA § 214(g)(7) states that the alien would need to be eligible at the time of filing, guidance received from OCC on 3/21/13 indicates that the alien should be considered to be eligible at the time of filing if he will have been outside the United States for more than one year as of the requested start date. This interpretation accounts for the fact that petitions can be, and for the H-1B CAP usually must be, filed six months before the start date.	
Readmission for the remainder of the initial 6-year period, **NOTE**: The alien is not subject to the H-1B CAP unless his or her previous entry was H-1B Cap exempt.	• Checked parts C-1-d and C-3-g of the I-129 H-1B Data Collection Supplement, • Indicated in a cover letter that the beneficiary is electing the "remainder" option, and • Submitted evidence to show the alien previously held H-1B status…	The time he or she has not used in the previously granted H-1B status.

Validity Period and the LCA

The validity period of the petition may be approved as follows: [8 CFR 214.2(h)(9)(iii) and Section 214(g)(8)(C) of the INA]

Classification	Validity Limitation
H-1B1	• Up to 3 years, but • May not exceed validity period endorsed by DOL on LCA.
H-1B2	• Up to 5 years. • **NO** LCA required.
H-1B3	• Up to 3 years. • May not exceed validity period endorsed by DOL on LCA.
HSC	• Up to 1 year, but • May not exceed validity period endorsed by DOL on LCA.

NOTE: It is the policy of VSC to give a 3-year validity period as 3 years "minus 1 day," e.g., 10/1/09 to 9/30/12, even if the LCA is certified from 10/1/09 to 10/01/12. According to *timeanddate.com*, if we gave from 10/1/09 to 10/1/12 for validity dates, this would calculate to 3 years plus 1 day, which is more than the allowable 3 years. The same "minus 1 day" practice should be applied to 1-year and 5-year validity periods.

Determining the Validity Period Right to Control

The validity period may be limited to the amount of time for which right to control is established, or one year, whichever is greater. Refer to the table below for guidance when certain conditions are present.

If right to control...	Then ...
Has only been established for a portion of the requested validity period, and additional evidence is required to establish other eligibility criteria,	• RFE for other eligibility criteria, and • Address right to control full requested validity period.
Has only been established for a portion of the requested validity period, and all other eligibility criteria has been established,	• Approve with a limited validity period.
Is established with an open ended contract and/or end-user,	• Approve for full requested validity period.

Expiring Licenses

Full licenses, to include wallet size or web verified, may include an expiration date. The license must be valid at the time of filing.

In many occupations an alien's license, though not a limited license, will not be valid for the entire length of time requested by the petitioner. Licensed

professionals must renew their full license every few years. The validity dates of an approved petition should not be limited simply because the alien's license will expire prior to the requested ending employment date.

[*See* Brown Memo *Validity Period of I-129 Petition* 7/10/95]

Temporary Licenses One-Year Limit

If a temporary license is available in the state of employment, and the alien is allowed to fully perform the duties of the occupation without a permanent license, then H classification may be granted.

Where licensure is required in an occupation, the petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer. [8 CFR 214.2(h)(4)(v)(E)]

IMPORTANT: If the file does not contain a temporary or permanent license and the state does not tell you that the person is eligible to practice immediately in that state without a temporary or permanent license, then do **NOT** approve the petition.

No License Required if Working Under Supervision of Licensed Professional

If the alien can perform the duties of the proffered position without licensure because he or she will work under the supervision of a licensed professional as permitted by State law, then the validity period of the petition will not be limited despite the lack of a permanent license.

Example 1.

A Medical Resident working under the supervision of a licensed physician in New York State is not required to have a license and thus, the validity of the petition should not be limited. [8 CFR 214.2(h)(4)(v)(C)]

Example 2.

Medical Residents in Connecticut do not need a license when working under the supervision of a licensed physician in a Connecticut hospital. The hospital must send a list of those who will be obtaining their residency with the hospital to the Connecticut licensing authority. Although the licensing authority issues a permit for all of the residents on the list, an individual permit is not issued to the resident. While the permit list is valid for one year, it is automatically renewed when the hospital requires an extension for the residents to obtain subsequent year(s) of training. Thus, the permit that is required for residents to work in Connecticut hospitals is not a license and the validity of the petition should not be limited. [8 CFR 214.2(h)(4)(v)(C)]

Example 3.

A Civil Engineer hired to design the construction of a public building (not to be confused with a Software Engineer) generally requires a license; however,

if the petitioner submits evidence to demonstrate the beneficiary will work under the supervision of a licensed engineer, then no license is required.

H-1B Process for LPRs

Refer to the table below to determine the action to take on an H-1B petition when the beneficiary adjusts to lawful permanent resident (LPR) status.

<table>
<tr><th>If the beneficiary...</th><th>Then...</th></tr>
<tr><td>Adjusts to LPR status after the requested start date on the H-1B petition,</td><td>Grant H-1B validity up to date of adjustment.</td></tr>
<tr><td>Adjusted prior to the requested start date, and
Seeks consular notification,</td><td>Adjudicate on merit. Notate the KCC copy to indicate the alien is an LPR.</td></tr>
<tr><td>Adjusted prior to requested start date, and
Seeks EOS/COS,</td><td>Send an RFE questioning the alien's intent to be a nonimmigrant or immigrant.
<table>
<tr><th>If the response indicates...</th><th>Then...</th></tr>
<tr><td>Intent to abandon LPR status,</td><td>Change the petition to consular notification, and
Indicate on the KCC copy that the alien will abandon LPR status at the consulate.</td></tr>
<tr><td>No intention to abandon LPR status,</td><td>Deny the EOS portion of the petition.</td></tr>
</table>
</td></tr>
</table>

Validity Periods (AC21)

Requested extensions made on validity periods previously granted beyond the 6-year period will be honored so long as they meet the requirements under AC21.

Since any time spent outside the United States while an alien holds H-1B status can be recaptured, an alien's H-1B period is not confined within a continuous six-year timeframe.

Validity Dates (AC21)

Refer to the table below to determine how long to grant the approval for.

If the case is a...	Then grant approval for...
First request for Section 106 of AC21 (i.e., a 7th year extension),	1 year, plus Any amount of time remaining in the initial 6-year period, not to exceed a maximum validity period of 3 years.
Second or subsequent request for Section 106 of AC21 (e.g., an 8th year extension),	A maximum of 1 year.

Starting and Ending Dates

Use the below table to determine the starting and ending validity dates of the H-1B petition. Note: if the requested validity dates have expired, then refer to the section on Expired Dates on page 13.

If...	Then starting validity date should be...	And ending validity date should be...
New employment, or Initial H-1B1, H-1B2, or H-1B3 request (Consular notification),	Date of approval, date requested, or LCA "from" date, whichever is later.	Date requested on petition or expiration date on LCA, whichever is earlier.[1]
Change of Status,	Date of approval, Start Date Requested, or the beginning ETA 9035 or ETA 750 period, whichever is later.	Date requested on petition or expiration date on LCA, whichever is earlier.
Change of Employer,	Date of approval, date requested, or LCA "from" date, whichever is later.	Date requested on petition or expiration date on LCA, whichever is earlier.[2]
Extension of same employer,	Day after expiration of previously approved H-1B for that company, or date requested, whichever is earlier, provided LCA supports the date.[4]	Date requested on petition or expiration on LCA, whichever is earlier.[2]
Amended petitions where there was a USCIS error with the original notice,	Same start date as initially approved petition.[3]	Same expiration date as initially approved petition.[3]
Amended petitions where there has been a change in the employment conditions,	Date of approval, date requested, or LCA "from" date, whichever is later.[4]	Same expiration date as initially approved petition, if no additional time is requested.
		Date requested on petition or expiration on LCA, whichever is earlier[2], if additional time is requested
New concurrent employment,	Date of approval or date requested, whichever is later, provided LCA supports the date.	Date requested on petition or expiration date on LCA, whichever is earlier.[2]
Same employer, Change in employment conditions,	Date of approval, date requested, or LCA "from" date, whichever is later.[4]	Date requested on petition or expiration date on LCA, whichever is earlier.[2]

[1] Ensure that beneficiary has not been granted H-1B status within previous 12 months. If so, do not exceed a total of 6 years of H-1B status unless eligible for exemption.
[2] Ensure that beneficiary is not granted more than a total of 6 years in H or L status unless HSC or eligible for exemption.
[3] Does not apply if amendment is due to incorrect validity dates.
[4] If the beneficiary's status has expired or will expire prior to the date that you selected as the "from" date, AND the petition was filed by the same employer, then backdate the validity date to the day after the beneficiary's status expires to eliminate gaps.

Jowett, Haley L

From: Oppenheim, Jennifer R
Sent: Wednesday, February 25, 2015 2:17 PM
To: Oppenheim, Jennifer R
Subject: FW: URGENT: S1's Upcoming Hearings - Updates to Issue Paper/Q&A Tasking - DUE Tomorrow, 11/25 at 3pm!
Attachments: USCIS Issue Paper - H-1B Visa Program (7-17-2014).docx

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From: Cummings, Kevin J
Sent: Tuesday, November 25, 2014 10:49 AM
To: Tynan, Natalie S; Doumani, Stephanie M
Cc: Levine, Laurence D; Parascandola, Ciro A; Viger, Steven W; Angustia, Kathleen M; Oppenheim, Jennifer R
Subject: RE: URGENT: S1's Upcoming Hearings - Updates to Issue Paper/Q&A Tasking - DUE Tomorrow, 11/25 at 3pm!

Thanks!

--Kevin

Kevin J. Cummings
Chief, Business & Foreign Workers Division
USCIS Office of Policy and Strategy
Department of Homeland Security

From: Tynan, Natalie S
Sent: Tuesday, November 25, 2014 10:21 AM
To: Doumani, Stephanie M
Cc: Levine, Laurence D; Cummings, Kevin J
Subject: FW: URGENT: S1's Upcoming Hearings - Updates to Issue Paper/Q&A Tasking - DUE Tomorrow, 11/25 at 3pm!
Importance: High

Stephanie – OP&S has comments on the H-1B paper. OLA wants consolidated comments, so I am passing ours along to you since you are lead on the paper. Please let us know if you have any comments.

Thank you,
Natalie

From: Cummings, Kevin J
Sent: Tuesday, November 25, 2014 7:01 AM
To: Tynan, Natalie S; Prelogar, Brandon B; Hamilton, Cristina A; Parascandola, Ciro A
Cc: Levine, Laurence D
Subject: RE: URGENT: S1's Upcoming Hearings - Updates to Issue Paper/Q&A Tasking - DUE Tomorrow, 11/25 at 3pm!
Importance: High

Thanks Natalie. A couple of suggested edits in redline in the two attachments.

--Kevin

Kevin J. Cummings
Chief, Business & Foreign Workers Division
USCIS Office of Policy and Strategy
Department of Homeland Security

From: Tintary, Ruth E
Sent: Monday, November 24, 2014 4:17 PM
To: Correa, Soraya; Meckley, Tammy M; McMillan, Howard W; Lotspeich, Katherine J; Henry, Laura R; Renaud, Daniel M; Monica, Donald J; Redman, Kathy A; Colucci, Nicholas V; Harrison, Julia L; Kendall, Sarah M; Mooney, Matthew C; Zellen, Lorie A; Emrich, Matthew D; FDNSExecSec; Neufeld, Donald W; Velarde, Barbara Q; Arroyo, Susan K; Rigdon, Jerry L; Langlois, Joseph E; Higgins, Jennifer B; Lafferty, John L; Kim, Ted H; Stone, Mary M; Schwartz, Claudia R; Perry-Elby, Diana D; Strack, Barbara L; Valverde, Michael; Chiorazzi, Anne; Tomlyanovich, William J (Bill); Busch, Philip B; Jaddou, Ur M; Carpenter, Dea D; Cox, Rachel M; Hinds, Ian G; OCC-Clearance; Renaud, Tracy L; Vanison, Denise; Levine, Laurence D; Tynan, Natalie S; Stanley, Kathleen M; Patterson, Katherine R; Rhew, Perry J; Garner, David C; McConnell, James E; Moore, Joseph D; Reilly, Richard M; Roman-Riefkohl, Guillermo; Smith, Alice J; Ooi, Maura M; Cantor, Esther R
Cc: Rodriguez, Leon; Scialabba, Lori L; Choi, Juliet K; McCament, James W; Atkinson, Ronald A; Wooden, Janeen R; Powell, Paul; Rodriguez, Miguel E; Brown, Katherine H; Francis, Gregory I; Dalal, Ankur P (Andy); Walters, Jessica S; Torres, Marina A; Amaya, John G; Torres, Marina A; Guttentag, Lucas; Inouye, Shinichi (Shin); Nino, Teresa; Beppu, Jennifer M; Irazabal, Luz F
Subject: URGENT: S1's Upcoming Hearings - Updates to Issue Paper/Q&A Tasking - DUE Tomorrow, 11/25 at 3pm!
Importance: High

Colleagues,

The House Homeland Security Committee has announced a December 2, 9:00 a.m. Hearing on "Open Border: the Impact of Presidential Amnesty on Border Security". Secretary Johnson has been invited to testify "on the federal response and preparation for the change (President's executive action) in policy". Additionally, the House Judiciary Committee has also called for a hearing on December 2, but has not specified a time or the DHS witness. (There is a possibility that D1 could be called as a witness however).

Per the Director's Office, we are proactively updating the USCIS Issue Papers (attached), in preparation. Note that the attached issue papers were either updated at the end of August for an S1 hearing or in July for D1's oversight hearing.

As you are updating these papers please keep in mind that these IPs should reflect the President's Executive Action.

Please know that we continue to follow the DHS guidance that: ***"ALL issues papers be no more than 2 pages, followed separately by 2-5 Q&As. The issue paper should be brief, clear and "to the point" – using bullets when possible. The paper should start with a concise set of talking points followed by any relevant background. These documents should be marked FOUO and should be titled using the titles given below in the tasking."***

I apologize for the incredibly tight turnaround, but please send your updated (and note who in OCC re-cleared it) issue paper to ME no later than 3:00pm, TOMORROW, Tuesday, November 25th. Given the upcoming holiday, please adhere to the due date and time because there are additional levels of clearances and interagency coordination required by DHS.

We ask the appropriate component to provide an updated Issue Paper on:

- **Anti-Fraud Efforts (FDNS)** ***(should include the Asylum Fraud paper and be tasked to FDNS)***
- **Asylum Fraud (~~RAIO/Asylum Division~~)** ***(should be merged with overall Anti-Fraud Efforts paper above)***
- **Credible Fear and Expedite Removal (RAIO/Asylum Division)**
- **EA Fact Sheets and Memo will substitute the CIR IP (OLA)**
- **Deferred Action for Childhood Arrivals-DACA (DACA Working Group/SCOPs)**
- **EB-5 investor visa program (IPO)**
- **E-Verify/SAVE Programs (ESD)**
- **Fee Structure and Process (CFO)** ***(given the EA announcement, how will you implement all of these programs?)***
- **H-1B Visa Program (SCOPS)** ***(given the EA announcement this should be merged with O IP and now include Ls and STEM focus- Highly Skilled Business and Workers)***
- **O Visa Program (SCOPS)** ***(given the EA announcement this paper should be merged H1B IP and now include Ls and STEM focus)***
- **Provisional Unlawful Presence (Form I-601A) Waiver Process (OCC/OP&S)** ***(in light of EA, should now be Expanded I-601A program)***
- **Refugee Screening Process (RAIO/RAD)** ***(Should now be focused on the In-Country UAC Program Refugee Screening Process)***
- **Temporary Protected Status (TPS) (OP&S)** ***(include the Ebola countries)***
- **Terrorist Related Inadmissibility Grounds (TRIG) (OCC)**
- **UACs and Asylum, USCIS' role in the Border Crisis (RAIO/Asylum)**
- **Transformation (FOD/OTC)** ***(in light of the EA announcement)***
- **Workload Balancing/Backlogs (MGMT)** ***(in light of the EA announcement, please partner with SCOPs to create a paper reflecting the larger/agency-wide Workload Balancing/Backlogs Impact)***

I apologize if I've overlooked any key recipients. Please feel free to share this with them.

Best,

Ruth E. Tintary
Associate Chief
Legislative Branch
Office of Legislative Affairs
U.S. Citizenship and Immigration Services
Dept. of Homeland Security
[redacted] (b)(6)
ruth.e.tintary@uscis.dhs.gov

FOR OFFICIAL USE ONLY

H-1B NONIMMIGRANT VISA PROGRAM

BACKGROUND:

- The H-1B nonimmigrant classification is for aliens coming to the United States temporarily to perform services:
  - in a specialty occupation which requires a theoretical and practical application of a body of specialized knowledge, who hold a U.S. bachelor's degree or its equivalent, and, generally, if otherwise required by state or local law, a license, as a minimum requirement for entry into the occupation within the United States;
  - of an exceptional nature requiring exceptional merit and ability relating to certain types of projects administered by the U.S. Department of Defense; or
  - as a fashion model of distinguished merit and ability who has attained national and international acclaim.

- There is a congressionally-mandated numerical limitation of 65,000 per fiscal year for new employment with some exceptions, including:
  - the first 20,000 petitions approved by USCIS where the beneficiary has obtained a U.S. master's degree or higher from a nonprofit or public U.S. institution of higher education;
  - petitions filed on behalf of beneficiaries who will work at nonprofit or public U.S. institutions of higher education or related or affiliated nonprofit entities, nonprofit research organizations or governmental research organizations; and
  - petitions filed between now and December 31, 2014 on behalf of beneficiaries who will work only in Guam or the Commonwealth of the Northern Mariana Islands.

- Petitions filed on behalf of current H-1B workers who have been counted previously against the ~~cap~~ numerical limitation (cap) within the past six years also do not count towards the congressionally mandated annual H-1B cap. This includes petitions to extend the amount of time a current H-1B worker may remain in the United States; petitions to change the terms of employment for current H-1B workers; petitions to allow current H-1B workers who have been counted against the cap to change employers; or petitions to allow current H-1B workers to work concurrently in a second H-1B position.

TALKING POINTS:

- On April 7, 2014, USCIS received a sufficient number of petitions to reach the statutory cap for Fiscal Year (FY) 2015. On the same day, USCIS also received more than 20,000 H-1B petitions on behalf of persons exempt from the cap under the U.S. advanced degree exemption. On April 10, 2014, USCIS used a computer-generated random selection process (commonly known as a "lottery") to select a sufficient number of petitions needed to meet the caps of 65,000 for the general category and 20,000 under the U.S. advanced degree exemption limit.

- USCIS continues to accept H-1B1 Chile and Singapore cap cases, as well as H-1B cap-exempt cases.

- The initial and extension periods of validity for H-1B specialty occupation petitions are issued in increments of up to three years. Validity issuance is not to exceed the maximum of six years, with certain exceptions under American Competitiveness in the Twenty-First Century Act of 2000 (AC21). For both initial filings and extensions, the validity period

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Prepared by: Stephanie Doumani, USCIS/SCOPS, *Stephanie.M.Doumani@uscis.dhs.gov*, (202) 272-1524
Date: *July 14, 2014*

issued to the beneficiary should not exceed the period listed on the Labor Condition Application (LCA).

- AC21 allows beneficiaries of H-1B petitions to extend their H-1B status beyond the maximum limit of 6 years and, in certain circumstances, to change employers while their permanent residence process is pending in either increments of one year or three years.

- General fees associated with the filing of an H-1B petition include a base petition fee of $325, an American Competitiveness and Workforce Improvement Act (ACWIA) fee of either $1,500/ $750 (required for initial petitions and first extensions for certain beneficiaries), and a Fraud Prevention and Detection fee of $500 (required for initial petitions and change of employers; no exceptions). Additionally, the Public Law 111-230 fee of $2,000 is required for initial petitions or change of employer petitions if the employer has 50 or more employees in the United States and more than 50% of those employees are in H-1B, L-1A, or L-1B status.

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QUESTIONS and ANSWERS:

Question: Is USCIS on track with processing H-1B extension of stay cases within the 60-day window at the California Service Center and the Vermont Service Center?
RESPONSE: The California Service Center is processing H-1B extensions of stay within the 60-day processing goal. The Vermont Service Center is working diligently to reach the goal as soon as possible.

Question: Has there been a change in policy regarding guidelines for determining employer-employee relationships and third-party placement?
RESPONSE: No. Our guidelines for determining eligibility center around the regulations and our most recently issued 2010 memorandum, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements." We have not had a recent change in policy. ~~We remind stakeholders that the~~The burden is on the petitioner to demonstrate a need for a 3-year validity period. ~~However, if a stakeholder encounters an RFE that appears to be outside the scope of our regulations and current guidelines, we ask that such requests be brought to our attention through our established customer service protocol.~~

Comment [KJC1]: Not needed for this audience.

Question: Has USCIS issued new guidance regarding defining "Specialty Occupation" and "Body of Highly Specialized Knowledge"?
RESPONSE: USCIS is currently reviewing its policies and practices related to H-1B adjudications, including the interpretation of the terms "Specialty Occupation" and "Body of Highly Specialized Knowledge".

Question: What is the current status of the proposed employment authorization for certain H-4 dependent spouses of principal H-1B nonimmigrants?
RESPONSE: On May 12, 2014, DHS published a proposed rule in the Federal Register which would extend the availability of employment authorization to certain H-4 dependent spouses of principal H-1B nonimmigrants. The extension was limited to H-4 dependent spouses of principal H-1B nonimmigrants if the H-1B nonimmigrants are either the beneficiaries of an approved Immigrant Petition for Alien Worker (Form I-140) or have been granted an extension of their authorized period of admission in the United States under the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), as amended by the 21st Century Department of

Prepared by: Stephanie Doumani, USCIS/SCOPS, *Stephanie.M.Doumani@uscis.dhs.gov*, (202) 272-1524
Date: *July 14, 2014*

Justice Appropriations Authorization Act. ~~Commentary was~~was Approximately 13,000 public comments were submitted during the 60-day comment period, which closed on July 11, 2014. USCIS is currently analyzing the comments and determining what, if any, revisions are needed. While we do not have an estimated date of publication, this rule is an agency priority.

Prepared by: Stephanie Doumani, USCIS/SCOPS, *Stephanie.M.Doumani@uscis.dhs.gov*, (202) 272-1524
Date: *July 14, 2014*

Jowett, Haley L

From: Oppenheim, Jennifer R
Sent: Wednesday, February 25, 2015 2:13 PM
To: Oppenheim, Jennifer R
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004
Attachments: FW: State Licensure; Cardin Letter US CIS Licensing Requirements.pdf; Johns Hopkins Letter.pdf; MBOP Letter to USCIS.PDF; MD Atty Gen Office Letter.pdf; MD Code Physician Licensing Exceptions.pdf; St. Agnes Hospital Letter.pdf

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From: Angustia, Kathleen M
Sent: Thursday, February 19, 2015 11:50 AM
To: Bump, Micah N; Miran, Maria Y
Cc: Cummings, Kevin J; Parascandola, Ciro A; Viger, Steven W; Oppenheim, Jennifer R
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Hi Maria and Micah,

I realize in my haste of sending the email, I didn't attach all documents relevant to Senator Cardin's inquiry (attached to this email). Also, I should have pointed out that OLA has requested that we provide a response by COB, Friday, February 20th. We may respond that we continue to look into this matter, as we determine the best approach moving forward.

(b)(6)

Kate Angustia | Adjudications Officer (Policy) | Business and Foreign Workers Division
USCIS Office of Policy and Strategy | Department of Homeland Security
[redacted] Kathleen.M.Angustia@uscis.dhs.gov

From: Angustia, Kathleen M
Sent: Wednesday, February 18, 2015 1:02 PM
To: Bump, Micah N; Miran, Maria Y
Cc: Cummings, Kevin J; Parascandola, Ciro A; Viger, Steven W; Oppenheim, Jennifer R; Lomax-Larson, Nikki L
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Hi Micah and Maria,

Senator Cardin's office contacted us about truncated H-1B approvals. Service Centers, supported by local OCC, approved medical resident H-1B petitions to one year instead of the requested three years. The petitions requested a future start date and state law did not require the physicians to register to practice medicine at the time of filing, and permits registration for a period of up to 90 days after commencing employment under contract. The Service Centers cut short the approval based on the lack of registration. The issue is that this requirement is for the chief of the institution providing the clinical training and not the H1B physician. OP&S questions whether USCIS should be limiting these approvals to one year. Attached is email traffic and the applicable MD law about registration.

Please let us know if you need anything from OP&S.

Kate

Kate Angustia | Adjudications Officer (Policy) | Business and Foreign Workers Division
USCIS Office of Policy and Strategy | Department of Homeland Security

202.272.0912 | Kathleen.M.Angustia@uscis.dhs.gov

From: Viger, Steven W
Sent: Wednesday, February 18, 2015 12:27 PM
To: Cummings, Kevin J; Parascandola, Ciro A
Cc: Oppenheim, Jennifer R; Angustia, Kathleen M; Lomax-Larson, Nikki L
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

It appears that CSC and VSC are enforcing a registration requirement (on advisement by local counsel) for petitions requesting a future start date and not required to register at the time of filing. The issue is that this requirement is for the chief of the institution providing the clinical training and not the H1B physician. i don't believe that we should be limiting these approvals to one year.

Steven Viger
Adjudications Officer (Policy)
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave., NW
Washington, DC 20529
P: [redacted] (b)(6)
F: (202) 272-8518
steven.w.viger@dhs.gov

From: Doumani, Stephanie M
Sent: Wednesday, February 18, 2015 11:40 AM
To: Viger, Steven W; Angustia, Kathleen M
Cc: Oppenheim, Jennifer R; Sweeney, Shelly A
Subject: RE: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Steve,

Please see the attached email with printouts from the Maryland Board of Physicians.

Thanks,
Stephanie

From: Viger, Steven W
Sent: Wednesday, February 18, 2015 11:34 AM
To: Doumani, Stephanie M; Angustia, Kathleen M
Cc: Oppenheim, Jennifer R; Sweeney, Shelly A
Subject: RE: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Thanks Stephanie.

Can you find out the specific Maryland law that requires registration? Thanks.

Steven Viger

Adjudications Officer (Policy)
Office of Policy and Strategy
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Department of Homeland Security
20 Massachusetts Ave., NW
Washington, DC 20529
P: [redacted] (b)(6)
F: (202) 272-8518
steven.w.viger@dhs.gov

From: Doumani, Stephanie M
Sent: Wednesday, February 18, 2015 10:58 AM
To: Angustia, Kathleen M
Cc: Viger, Steven W; Oppenheim, Jennifer R; Sweeney, Shelly A
Subject: RE: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Hi Kate,

I have attached my correspondence with the CSC regarding the issue brought up by Senator Cardin's office. This issue initially came up as a question during one of our AILA teleconferences last year (August of 2014). As you will see from the attached correspondence, VSC and CSC local OCC agreed that if a petitioner files the H-1B for a medical resident to work in Maryland with a future start date and they indicate that they do not need to register them now, but will do so later as required by Maryland law, USCIS cannot deny them and an approval would be warranted for a limited one-year validity period as our regulation only requires submission of the license or registration if it is required to fully perform the job (and in Maryland, it is not -at least for the first 30 days).

I think it may be worth bringing this issue up to HQ OCC to see if they are in agreement with the validity limitation. Thoughts?

Please feel free to give me a ring so we can further discuss.

Thanks,
Stephanie

From: Angustia, Kathleen M
Sent: Friday, February 13, 2015 12:36 PM
To: Doumani, Stephanie M
Cc: Viger, Steven W; Oppenheim, Jennifer R
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Hi Stephanie,

I can't remember if I needed to forward this to you or not-apologies if you have already received this! It was nice chatting with you yesterday.

Kate

Kate Angustia | Adjudications Officer (Policy) | Business and Foreign Workers Division

USCIS Office of Policy and Strategy | Department of Homeland Security
202.272.0912 | Kathleen.M.Angustia@uscis.dhs.gov

From: Parascandola, Ciro A
Sent: Thursday, February 12, 2015 1:59 PM
To: Viger, Steven W; Angustia, Kathleen M; Oppenheim, Jennifer R
Cc: Cummings, Kevin J
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Hi H-1B Team –

Please see attached and below and coordinate with SCOPS as necessary. Due 2/20. Don't worry about OCC clearance, OLA can do that. Thanks!

Ciro Parascandola
Deputy Chief, Business and Foreign Workers Division
USCIS Office of Policy and Strategy, DHS
Office [redacted] (b)(6)

From: Levine, Laurence D
Sent: Thursday, February 12, 2015 1:50 PM
To: Cummings, Kevin J; Parascandola, Ciro A
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Here ya go

Larry Levine
Senior Advisor to the Chief
Office of Policy & Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
[redacted] (b)(6)

From: Weller, Angela V
Sent: Thursday, February 12, 2015 1:36:33 PM
To: Levine, Laurence D; Tynan, Natalie S; Policy-Clearance; Graziadio, Josie; Kvortek, Steven P (Steve); SCOPS-Clearance; Arroyo, Susan K; Cox, Sophia
Cc: Rodriguez, Miguel E
Subject: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

OP&S (cc: SCOPS),

Senator Cardin wrote to the Director regarding concerns about the CSC's limits on H1B sponsorship of medical residents. Please draft a response, coordinate your response with SCOPS as needed, and submit your response to me by **COB Friday, February 20**. The response will be for USCIS OLA's signature.

If you have any questions or concerns, please feel free to let me know.

Thank you,

Angela V. Weller
Writer/Editor
Office of Legislative Affairs
U.S. Citizenship and Immigration Services
Desk [redacted] (b)(6)
Mobile [redacted]
angela.v.weller@uscis.dhs.gov

Jowett, Haley L

From: Doumani, Stephanie M
Sent: Wednesday, February 18, 2015 10:37 AM
To: Doumani, Stephanie M
Subject: FW: State Licensure
Attachments: Registration 1.pdf; Registration 2.pdf

From: Fierro, Joseph
Sent: Wednesday, August 13, 2014 5:45 PM
To: Doumani, Stephanie M
Cc: Sweeney, Shelly A; Haskell, Alexandra P; Baltaretu, Cristina G
Subject: RE: State Licensure

Stephanie:

I'm talking about registration.

We are aware the medical residents are exempt from licensure, however, in practice we have been ensuring they meet any other authorization which may be required by the state in accordance with 214.2(h)(4)(viii)(A)(1)-(2). We have never receive any evidence that demonstrates that state registration is not required for the resident to practice medicine.

When I reviewed the inquiry I started questioning whether we were applying this regulation correctly by requiring evidence of registration.

I attached the registration requirements for the state of Maryland for medical residents for your review. The question I had when it was raised to me is are the medical residents required registration to practice medicine? This is what counsel is reviewing.

(A) Beneficiary's requirements. An H-1B petition for a physician shall be accompanied by evidence that the physician:

214.2(h)(4)(viii)(A)(1)-(2)

(1) Has a license or other authorization required by the state of intended employment to practice medicine, or is exempt by law therefrom, if the physician will perform direct patient care and the state requires the license or authorization, and

---

From: Doumani, Stephanie M
Sent: Wednesday, August 13, 2014 1:03 PM
To: Fierro, Joseph
Cc: Sweeney, Shelly A; Haskell, Alexandra P; Baltaretu, Cristina G
Subject: RE: State Licensure

Hi Joe,

Thanks for the update. When you say register, do you mean obtain a license? If my understanding is correct, you're stating that the petitioner did not provide evidence of a license at the time of filing but then later did, correct? We ask because the question uses this case example after indicating that certain states do not require individual licensure for medial residents because the residents are covered under the institutional l license of the accredited institution where they are performing their training. The question goes on to claim that even when documentation of state law was provide, H-1B petitions were denied based on "insufficient evidence" of state authorization to practice medicine as a medical resident. If this case example does not support such a claim, which from the sounds of it doesn't, we want to indicate as much in our response.

Again, I really don't think one case (if it relates to the issue at hand) represents a trend, but can you speak to whether you've seen an uptick of denials regarding licensure? It sounds like you are waiting to hear back from OCC regarding this issue before touching base with adjudications during round tables and trainings.

Thanks,
Stephanie

From: Fierro, Joseph
Sent: Wednesday, August 13, 2014 11:57 AM
To: Doumani, Stephanie M
Cc: Sweeney, Shelly A; Haskell, Alexandra P; Baltaretu, Cristina G
Subject: RE: State Licensure

Stephanie:

I remember this case where the state licensure came up concerning interns who want to practice medicine in Maryland. The petitioner believes they do not need to register in order to practice medicine before approval and feel they can register later or after approval, while we have been requiring them to register before they are approved since it appears to be a state requirement.

We asked local counsel to review the issue to see if they think we are correct in asking for registration before we made a final denial since the petitioner was very adamant that they do not need to register before they are approved. Counsel said they agree with us so went forward with the denial .

The petitioner ultimately registered and provided the proof that they registered the beneficiary after it was denied, so we decided to do a service motion to reopen and granted the case.

Even though they provided the evidence of registration and the case was ultimately approved , I asked local counsel to review the issue again to confirm we are on the right track. They are still reviewing the issue and we are awaiting their opinion.

Joe

From: Baltaretu, Cristina G
Sent: Wednesday, August 13, 2014 8:17 AM
To: Doumani, Stephanie M; Fierro, Joseph
Cc: Sweeney, Shelly A; Haskell, Alexandra P
Subject: RE: State Licensure

Hi Stephanie,

No worries – thank you for providing the correct receipt number. We are looking into it and will get back to you.

Cristina

From: Doumani, Stephanie M
Sent: Wednesday, August 13, 2014 6:56 AM
To: Baltaretu, Cristina G; Fierro, Joseph
Cc: Sweeney, Shelly A; Haskell, Alexandra P
Subject: RE: State Licensure

(b)(6)

Cristina,

I'm really sorry! I put in the wrong receipt number below. The receipt number referenced by AILA was [redacted]

Thanks,
Stephanie

From: Baltaretu, Cristina G
Sent: Tuesday, August 12, 2014 7:10 PM
To: Doumani, Stephanie M; Fierro, Joseph
Cc: Sweeney, Shelly A; Haskell, Alexandra P
Subject: RE: State Licensure

(b)(6)

Hi Stephanie,

Joe had to leave a little earlier, so we followed up with an SISO on his team who had this petition. She mentioned there is no licensure issue with receipt [redacted] rather this case involves the ONET LCA-SOC code issue.

Can you please double check and confirm the receipt number for case referenced below by AILA?

Thanks,
Cristina

From: Doumani, Stephanie M
Sent: Tuesday, August 12, 2014 2:50 PM
To: Fierro, Joseph; Baltaretu, Cristina G
Cc: Sweeney, Shelly A; Haskell, Alexandra P
Subject: State Licensure

Hi Joe,

We had one other question from the AILA agenda regarding state licensure. (Last one!) (b)(6)

AILA indicates that they have received denials for cases based on "insufficient evidence" of state authorization to practice medicine as a medical resident. In their example, they referenced [redacted] and indicate that the state in question did not require individual licensure for medical residents. CLAIMS shows that while the case was originally denied, it was re-opened and approved. In general, we don't feel that one case represents any sort of trend. However, we just wanted to touch base with you to see if you've noticed an influx in denials relating to state licensure and if the issue of state licensure has been mentioned in any round table discussions.

Thanks in advance for your help!

Stephanie

MARYLAND BOARD OF PHYSICIANS

Registration Instructions for Unlicensed Medical Practitioners ("UMP")

REGISTRATION INSTRUCTIONS

Chief of Service- Responsibility

The Maryland Annotated Code, Health Occupations §14-302 (1) allows a medical school graduate in an accredited postgraduate clinical training program to practice medicine without a license while performing the assigned duties at any office of a licensed physician, hospital, clinic or similar facility. This medical school graduate is otherwise referred to as an "Unlicensed Medical Practitioner" ("UMP").

The Chief of Service of the institution providing the accredited postgraduate clinical training program, or the Chief's designee has the responsibility to ensure the proper registration of each Unlicensed Medical Practitioner with the Maryland Board of Physicians.

The hospital Chief of Service must also register an UMP who has a training program contract with an out-of-state institution, but who is on rotation in a Maryland facility. The Maryland facility must have a written training program agreement with the out-of-state institution **indicating that the rotation is part of the postgraduate training program.** In addition, the training program in the out-of-state institution should be accredited by the Accreditation Council for Graduate Medical Education.

An UMP who has been registered by a Maryland hospital Chief of Service for the current contract year and who will be on rotation in another Maryland institution within the said contract year does not have to be registered by the Chief of Service of the second institution.

Completing the Registration Form for the Registration and Re-registration of UMPs

1. **Part A**-The Unlicensed Medical Practitioner ("UMP") completes Part A.

   - **Initial or Re-registration:** UMP application: Please indicate if the application is an initial or a re-registration application.
   - **Re-registrations:** All UMP's keep the same UMP number while in training, regardless of the program, program location, or institution affiliation. Therefore, if you have previously been issued an UMP number, provide that "original UMP number" when completing the re-registration form.
   - **Current Registration Period:** This period refers to either (a) the full contract year or (b) the duration of an official rotation for which an UMP will be registered in order to practice medicine under COMAR 10.32.07. All applications must have a contract start date and a contract end date.
   - **Character and Fitness questions**-"Item 11"- **all "yes" answers must be accompanied by additional documentation as specified on the application. (See application for details).**

2. **Part B**-The "Chief of Service or the Chief of Service's designee" completes Part B.

- The Chief of Service or the Chief of Service's designee must be a physician currently licensed to practice in the State of Maryland.

3. **Institutions -forwarding the registration forms to the Board of Physicians.**

   - UMP applications should be sent to the Board's post office box through one institutional office to ensure proper procedures are followed. Please send the completed application form along with the required fee of $100.00 per UMP, by check or money order, payable to the Maryland Board of Physicians. The check must state "UMP registration" and be accompanied by a complete list of each UMP that is covered by the enclosed check or money order.

   - Make sure that the fee matches the number of applications times $100.00. Otherwise, there will certainly be delays in the registration both at the bank and the Board office.

Registration deadline:

- Initial UMP registrations-the completed application and fee, must be received no later than 30 days from the contract start date between the accredited training program and the UMP.

- Re-registration of an UMP-the completed application and fee must be received no later than 60 days from the contract start date between the accredited training program and the UMP.

- Please mail all UMP applications, including the correct registration fee (number of applications times $100.00 each) and the list of UMP's to:

Maryland Board of Physicians
P.O. Box 37217
Baltimore, Maryland 21297

- To help speed up the registration process, also please e-mail the list of UMP's to mhigby@dhmh.state.md.us using the attached format.

- Institutions may duplicate the registration form and the regulations which are available on the Maryland Board of Physician's website at www.mbp.state.md.us (select Download Forms, Physician Forms, and choose the Registration and Re-registration of Unlicensed Medical Practitioners form).

Please do not send any applications for UMP's to the Patterson Avenue address.

Failure to meet the deadlines may result in a violation of Md. Code (Health Occupations Article Section 14-404(a) (3) and (a) (18) and COMAR 10.32.07.04F.

Revised: 03/26/2007
MTA:kmb

Attachment

Unlicensed Medical Practitioner-registration spreadsheet.

To assist the Maryland Board of Physician (MBP) in registering applicants as Unlicensed Medical Practitioners, in addition to the paper registration forms, please send the applicant's information in a spreadsheet to the attention of Mr. Mark Higby at mhigby@dhmh.state.md.us

Use the following format:

Column	Description
A	Registration number (leave blank for initial registrations)
B	Applicant's last name
C	Applicant's first name
D	Applicant's middle initial
E	Date of applicant's birth (mm/dd/yyyy)
F	Applicant's social security number (###-##-####)
G	Applicant's sex (M or F)
H	Applicant's ethnicity (Oriental/Asian, Black, White, Hispanic, Amer. Ind.)
I	Applicant's medical school name
J	Applicant's date of graduation from medical school (mm/dd/yyyy)
K	Degree earned (MD, DO, MBBS, MD, PhD, etc)
L	Department/Division
M	Institution's name
N	Institution's street address
O	Institution's city
P	Institution's state
Q	Institution's zip code
R	Institution's telephone number
S	Institution's facility code as issued by MBP
T	Appointment start date
U	Appointment end date
V	Section 11 (Y or N)
W	ACGME number
X	Director's Name
Y	Director's License Number
Z	Director's phone number
AA	Program (area of concentration)

Remember: The Board of Physicians cannot register or re-register an individual as an unlicensed medical practitioner unless both the complete application and payment has been received by the bank, reviewed at the Board, and entered into the Board's system.

MARYLAND BOARD OF PHYSICIANS

P.O. Box 37217
Baltimore, Maryland 21297
(410)764-4777

FOR BANK USE ONLY

DATE:____/____/200__

CHECK NUMBER:_____

AMT PAID: $ _____

NAME CODE:_____ APPID: 33

For Board use only

Date registered:_____

UMP number: P _ _ _ _ _

UNLICENSED MEDICAL PRACTITIONER APPLICATION

PART A: Circle one: Initial Registration; Re-registration UMP Number P_____

1) Last name and generational indicator (Jr., III, etc.)

First name and Middle Initial

2) Date of Birth: (month) (day) (year) **3) Social Security Number:**

4) Gender: F or M (circle one) **5) Race: (circle one)** White Black Native American Oriental/Asian Hispanic Other

6) Medical Degree Received From: _____ **Date of Graduation:**

7) Have you ever been licensed by a medical board? (circle one) Maryland Y N If yes, list license number_____ Other Y N If yes, list state(s) and license number_____

8) Degree: (MD, DO)

9) Local Address of Accredited Training Program: (This is your address of record with the Board.)

Department:

Name of Maryland Institution:

Address:

City/County **State:** **Zip Code Plus 4** –

Daytime Phone: - -

10) Current Contract Year of Registration: This should not precede the starting date of your current contract year.

From:____/____/____ **To:**____/____/____

11) Answer the following questions. If you have had any legal actions taken against you, provide a complete explanation and supporting documentation such as copies of all complaints, malpractice claims, adverse or disciplinary actions, arrest pleadings, judgements or final orders. Sign and date all pages submitted.

Yes	No		
☐	☐	a.	Do you have a physical or mental condition that could impair your ability to practice medicine or that would cause reasonable questions to be raised about your physical, mental, or professional competency including drug and alcohol abuse?
☐	☐	b.	Has any licensing or disciplinary board of any jurisdiction or an entity of the armed services ever denied your application for licensure, registration, certification or limited licensure, reinstatement or renewal, or taken any action against your license, registration, certification or limited licensure, including but not limited to reprimand, suspension, revocation, a fine, or nonjudicial punishment?

Yes	No		
☐	☐	c.	Have you ever surrendered or allowed your medical or any other healthcare license, registration, certification, or limited license to lapse, or have you ever withdrawn an application for any of the above, while you were under investigation by any licensing or disciplinary board of any jurisdiction or an entity of the armed services?
☐	☐	d.	Have any complaints, investigations, or charges ever been brought against you or are any currently pending in any jurisdiction by any licensing or disciplinary board, or an entity of the armed services?
☐	☐	e.	Have you pled guilty, nolo contendere, been convicted of, received probation before judgement or other diversionary disposition for any criminal act?
☐	☐	f.	Have you committed an offense involving alcohol or controlled dangerous substances to which you pled guilty or nolo contendere or for which you were convicted or received probation before judgement? Such offenses include, but are not limited to, driving while under the influence of alcohol and/or controlled dangerous substances.
☐	☐	g.	Excluding minor traffic violations, are you currently under arrest or released on bond, or are there any current or pending charges against you in any court of law?
☐	☐	h.	Has a malpractice claim or legal action for damages been filed, settled or awarded against you in any jurisdiction?
☐	☐	i.	Has any hospital, HMO, or other related healthcare institution, or military entity denied your privileges, denied any application for privileges, failed to renew your privileges, or limited, restricted, suspended or revoked your privileges for any reason except for medical record tardiness or non-payment of staff dues?
☐	☐	j.	Has your employment by any hospital, HMO, other healthcare institution, or military entity been terminated for any disciplinary reasons?
☐	☐	k.	Have you ever voluntarily resigned from any hospital, HMO, healthcare institution, or military entity while under investigation by that institution for disciplinary reasons?
☐	☐	l.	Has any postgraduate residency or fellowship training program ever denied your application, failed to renew your contract, or terminated any contract or appointment for any disciplinary reasons or while you were under investigation for any disciplinary reasons?
☐	☐	m.	Have you voluntarily terminated any postgraduate residency training program or fellowship contract or appointment while under investigation by that program or related institution for any disciplinary reasons?
☐	☐	n.	Have you been suspended, placed on probation, formally reprimanded or asked to resign while in a postgraduate residency training program or fellowship?

12) **Affirmation:** I have read COMAR 10.32.07 and will comply with the regulations. I affirm that the information I have given in this application, including that given in response to questions in Item 11, is true and correct to the best of my knowledge and belief.

Signature:_____ Date:_____

PART B: FOR COMPLETION BY THE MARYLAND INSTITUTION CHIEF OF SERVICE OR DESIGNEE

13) Is the applicant in an ACGME accredited program? ☐ Yes ☐ No ACGME Accreditation Number_____

14) Name of Maryland Hospital, Maryland Medical School, or Maryland Facility: _____

Medical Staff Coordinator:_____ **Phone #:**_____

15) **Attestation:** I attest that I have read COMAR 10.32.07 and will notify the Maryland Board of Physicians of any termination of a contract other than by natural expiration, and the reasons for the termination.

Signature:_____ Title:_____ Date:_____
(Chief of Service or Designee)

Name in Print:_____

Phone #:_____ Maryland License Number: ☐☐☐☐☐☐☐☐

(9) "Postgraduate training program" means a clinical medical training program for medical school graduates including, but not limited to, internships, residencies, and fellowships.

(10) "Unlicensed medical practitioner" means:

(a) A medical school graduate practicing medicine in a postgraduate training program who is not licensed to practice medicine in this State; or

(b) A medical school student practicing medicine in a clinical clerkship in this State.

10.32.07.02

.02 Clinical Clerkships.

A. A medical student may engage in a clinical clerkship training program in Maryland if:

(1) The medical student participates only in:

(a) An accredited training program which has an affiliation, expressed in writing, with the student's medical school for the express purpose of providing clinical training to the medical student, if at least one department in the hospital has a formal affiliation with an LCME-accredited medical school, or

(b) A hospital, hospital department, clinic, or similar facility that is affiliated with an LCME-accredited medical school, which may include training in the office of a physician affiliated, by faculty appointment or other written agreement, with the accredited medical school for the purpose of teaching the medical student;

(2) All medical students of the same educational level engaged in clinical clerkships at that physician's office, hospital, hospital department, clinic or similar facility train under the same conditions, with the same privileges and limitations; and

(3) The physician's office, hospital, hospital department, clinic or similar facility will cease to train medical students if the American medical school with which it is affiliated is no longer accredited by the LCME, or if the postgraduate training program is no longer ACGME-accredited.

B. A medical student practicing medicine outside the scope of the provisions of §A of this regulation is considered to be practicing medicine beyond the scope of Health Occupations Article, §14-302, Annotated Code of Maryland.

10.32.07.03

.03 Postgraduate Programs.

An unlicensed medical school graduate may practice medicine only in an accredited training program, and only under a written training program contract with the providing institution.

.05 Exemption for Practitioners in Federal Programs.

An unlicensed medical school graduate in a postgraduate training program under the jurisdiction of the federal government is exempt from these regulations while performing duties incident to that training program

10.32.07.06

.06 Fee.

The Board shall establish a fee for registration and reregistration to be paid by the unlicensed medical school graduate but collected and forwarded by the institution providing the postgraduate training program with the registration form.

10.32.07.07

.07 Prohibited Conduct, Hearings, and Appeals.

A. The Board or its designee shall investigate all complaints alleging prohibited conduct and other information obtained regarding an unlicensed medical practitioner, according to the Board's procedures.

B. For any of the causes constituting a ground for discipline, subject to the hearing provisions of Health Occupations Article, §14-405, Annotated Code of Maryland, on the affirmative vote of a majority of its fully authorized membership, the Board may:

(1) Reprimand an unlicensed medical practitioner;

(2) Place an unlicensed medical practitioner on probation;

(3) Suspend or revoke the registration of an unlicensed medical practitioner; or

(4) Take other action against the individual including, but not limited to:

(a) Limiting the privilege to practice,

(b) Requiring further education, or

(c) Admonishing the individual.

C. The following causes constitute grounds for discipline:

(1) Physical, mental, or professional incompetence;

(2) An act or omission that resulted in disciplinary action against the unlicensed medical practitioner in connection with the postgraduate training program;

(3) Physical or mental illness that adversely affects the ability to practice in the postgraduate training program;

(4) Immoral or unprofessional conduct of the unlicensed medical practitioner in the practice of medicine;

(5) Practicing medicine beyond the authorized scope of practice;

(6) Abandonment of a patient;

(7) Practicing medicine while:

(a) Under the influence of alcohol, or

(b) Using any narcotic or controlled dangerous substance as defined in Criminal Law Article, Annotated Code of Maryland, or other drug that is in excess of therapeutic amounts or without valid medical indication;

(8) Willfully making or filing false reports or records in the practice of medicine;

(9) Willfully omitting to file or record, or willfully impeding or obstructing the filing or recording, or inducing another person to omit to file or record, medical reports required by law;

(10) Willfully misrepresenting treatment;

(11) Offering, undertaking, or agreeing to cure or treat disease by a secret method, procedure, treatment, or medicine;

(12) Failing to furnish details of a patient's care to physicians, hospitals, or the Board upon proper request;

(13) An act or omission which has resulted in disciplinary action against the unlicensed medical practitioner by the licensing or disciplinary authority, court, or sponsoring institution in another state, territory, or country for an act that would be grounds for disciplinary action under this regulation;

(14) Fraud or deceit in gaining admission to the postgraduate training program;

(15) Promotion of the sale of drugs, devices, appliances, or goods provided for a patient in such a manner as to exploit the patient for financial gain of the unlicensed medical practitioner;

(16) Division of fees, or agreeing to split or divide fees received for professional services, with any person for bringing or referring a patient;

(17) Agreeing with clinical or bioanalytical laboratories to make payments to these laboratories for an individual test or a test series for a patient, unless the unlicensed medical practitioner discloses on the bills to the patient or third-party payer the name of the laboratory for the individual test or test series and the amount of the procurement or processing charge, if any, for each specimen taken;

(18) Grossly overutilizing health care services;

(19) Willfully submitting false statements to collect fees for services not rendered;

(20) Violation of any regulation promulgated by the Board regarding the practice of medicine by unlicensed medical practitioners;

(21) Knowingly failing to report suspected child abuse in violation of Family Law Article, §5-704, Annotated Code of Maryland;

(22) Except in an emergency life-threatening situation when it is either infeasible or impracticable, failing to comply with the Centers for Disease Control's guidelines on universal precautions;

(23) Failing to cooperate with a lawful investigation conducted by the Board; and

(24) Refusing, withholding from, denying, or discriminating against an individual with regard to the provision of professional services for which the unlicensed medical practitioner is registered and qualified to render because the individual is HIV positive.

D. Crimes Involving Moral Turpitude.

(1) The Board shall order the suspension of the registration of an unlicensed medical practitioner if the practitioner is convicted of or pleads guilty or nolo contendere with respect to a crime involving moral turpitude, whether or not any appeal or other proceeding is pending to have the conviction or plea set aside.

(2) After completion of the appellate process, if the conviction has not been reversed or the plea has not been set aside with respect to a crime involving moral turpitude, the Board shall order the revocation of the unlicensed medical practitioner's registration subject to the statutory mandate of Health Occupations Article, §14-404(b)(2), Annotated Code of Maryland.

10.32.07.04

.04 Registration.

A. The chief of service of the institution providing the postgraduate clinical training program, or the chief's designee, shall register with the Board each unlicensed medical school graduate within 30 days of the effective date of the training program contract between the institution and the unlicensed medical school graduate.

B. Registration shall be on a form supplied by the Board, which may include for the unlicensed medical school graduate applicant:

(1) Name of the applicant;

(2) Local address;

(3) Date of birth;

(4) Social Security number which the Board shall use only for evaluation and identification of applicants and licensees but may not disclose in any other context;

(5) Character and fitness questions;

(6) Name and address of the medical school attended;

(7) Date of graduation from medical school;

(8) Name and address of the institution and department directly responsible for the postgraduate training program;

(9) Name and address of the chief of service and supervisor of the postgraduate training program; and

(10) Beginning and ending dates of the contract.

C. Registration shall remain valid for the term of the contract, as stated on the registration form.

D. Reregistration by the chief of service of the institution acting on behalf of the unlicensed medical school graduate is required for each renewal or extension of the postgraduate training program contract.

E. The chief of service of the institution providing the postgraduate training program shall notify the Board, within 30 days, and any termination of a contract, other than by natural expiration, and of the reasons for the termination.

F. Unprofessional Conduct in the Practice of Medicine. Health Occupations Article, §14-404(a)(3), Annotated Code of Maryland, includes the failure of a physician to comply with the regulations governing the duty of the chief of service to timely register unlicensed medical practitioners under the chief's charge.

Unlicensed Medical Practitioner-registration spreadsheet Guidelines.

To assist the Maryland Board of Physician (MBP) in registering applicants as Unlicensed Medical Practitioners, in addition to the paper registration forms, please send the applicant's information in a spreadsheet to the attention of Mr. Mark Higby at mhigby@dhmh.state.md.us

Use the following format:

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B	Applicant's last name
C	Applicant's first name
D	Applicant's middle initial
E	Date of applicant's birth (mm/dd/yyyy)
F	Applicant's social security number (###-##-####)
G	Applicant's sex (M or F)
H	Applicant's ethnicity (Oriental/Asian, Black, White, Hispanic, Amer. Ind.)
I	Applicant's medical school name
J	Applicant's date of graduation from medical school (mm/dd/yyyy)
K	Degree earned (MD, DO, MBBS, MD, PhD, etc)
L	Department/Division
M	Institution's name
N	Institution's street address
O	Institution's city
P	Institution's state
Q	Institution's zip code
R	Institution's telephone number
S	Institution's facility code as issued by MBP
T	Appointment start date
U	Appointment end date
V	Section 11 (Y or N)
W	ACGME number
X	Director's Name
Y	Director's License Number
Z	Director's phone number
AA	Program (area of concentration)

Remember: The Board of Physicians cannot register or re-register an individual as an unlicensed medical practitioner unless both the complete application and payment has been received by the bank, reviewed at the Board, and entered into the Board's system.

10.32.07.03

.03 Postgraduate Programs.

An unlicensed medical school graduate may practice medicine only in an accredited training program, and only under a written training program contract with the providing institution.

- E-2C still being held.

- Notice shall be made to the employer held for C/P

- validity dates: backdating of any sort should be monitored.

STATE OF MARYLAND
DHMH Board of Physicians
Maryland Department of Health and Mental Hygiene
4201 Patterson Avenue • Baltimore, Maryland 21215-2299
Martin O'Malley, Governor – Anthony G. Brown, Lt. Governor – Joshua M. Sharfstein, M.D., Secretary

August 27, 2014

US CIS
California Service Center
Laguna Niguel, CA 92677

To Whom It May Concern:

I am the Executive Director of the Maryland Board of Physicians (MBOP). I understand that you are questioning how Maryland licensing laws apply to medical residents participating in residency programs in Maryland. The attached letter (Exhibit A) from our attorney, Noreen Rubin, Asst. Attorney General, dated July 16, 2014, accurately states the law. The law and regulations concerning licensure provide exceptions, including one for medical residents who are participating in residency programs, such as the Internal Medicine program at St. Agnes Hospital, which are accredited by the Accreditation Council for Graduate Medical Education. Medical residents who are in such programs are not required to secure a Maryland medical license. These accredited programs are approved pursuant to our regulations. See Section 10.32.07.01 and Section 10.32.07.03 in the Code of Maryland Regulations ("COMAR"). The MBOP does not issue discrete and individual approvals of any residency programs but instead has done so via these regulations. See Ms. Rubin's letter for further confirmation and clarification.

I understand that you have also inquired about the 'written training program contract with the providing institution' mentioned in COMAR 10.32.07.03. Training programs satisfy this requirement by using written contracts of employment such as "Medical Residency Agreements" or other sorts of written contracts that confirm the basic terms of the program. The MBOP does not ask for or receive copies of these agreements. It is a requirement imposed on the facility offering the training program that we expect the facility to honor. If a facility does not comply with this requirement, it does not mean that the resident needs a Maryland medical license. It means that the offending facility could be subject to sanctions or penalties.

I also understand that you have asked for evidence that a beneficiary resident "has been approved by the Maryland Board of Physicians to practice as an unlicensed physician in the State of Maryland." The MBOP does not approve or disapprove of any residents to participate as unlicensed medical practitioners in Maryland. If a resident is participating in an accredited residency program in Maryland, he or she does not need a medical license, per the Maryland code sections identified in Ms. Rubin's letter dated July 16, 2014.

Toll Free 1-800-492-6836 • 410-764-4777 • Fax 410-358-2252
Web Site: www.mbp.state.md.us

Once residents are selected for programs, the programs or facilities offering the programs are obligated to comply with certain requirements, including registering the residents with the MBOP within thirty (30) days of the program's effective date or the date the resident starts in the program, whichever is later. This registration does not mean that the registered residents are "approved" to work as unlicensed medical practitioners; it simply means that the facility has provided us with information the MBOP requires. If a facility/training program fails to register a resident, the facility is subject to sanctions or penalties for failing to meet the regulatory requirements, but that failure does NOT mean that the unregistered resident needs a Maryland medical license.

Again, the MBOP does not 'approve' any resident for participation in any residency program. A request for evidence that a particular resident has been "approved by the Maryland Board of Physicians to practice as an unlicensed physician in the State of Maryland" appears to be founded on a misunderstanding of Maryland licensing laws and the MBOP's regulations.

I trust that this clears up any questions or confusion you may have concerning these programs in Maryland and hope it will enable the applications for medical residents in Maryland to be processed more efficiently.

Yours truly,

Christine A. Farrelly

Christine A. Farrelly
Executive Director

SAINT AGNES
HOSPITAL

January 23, 2015

The Honorable Ben Cardin
100 S. Charles Street
Tower 1, Suite 1710
Baltimore, MD 21201

Dear Senator Cardin:

We would like to request your assistance with a longstanding problem with the United States Citizenship & Immigration Services (CIS), and in particular with the CIS's California Service Center (CSC). The CSC randomly and arbitrarily shortens the H-1B approval period for certain of our medical residents, making the process needlessly expensive and inefficient. We will appreciate your help in ensuring that the CSC stops this practice and follows the law.

Some years ago, St. Agnes Hospital began sponsoring its medical residents for H-1B status; some residents are expected to participate in our programs for one year, while others are expected to participate for three or more years. Taking these factors into account, St. Agnes, through its counsel, Frances O'Connell Taylor, has prepared and submitted paperwork to the CIS's California Service Center (CSC), as required by CIS jurisdictional directives. Each petition has requested the appropriate period of stay up to the permitted three years, based on the particular resident's anticipated period of participation in the program. Again, some are for one year, while others are expected to participate for a full three year period, and the petitions reflect these expectations. In some cases, the CIS has approved the requested three year period, while in others, the CSC has approved only one of the three years requested. When asked why there was a different result in otherwise identical cases, the CSC officers have routinely stated to counsel that the abbreviated period was given so that the resident could obtain Maryland medical licensure.

This view ignores Maryland law. Under Maryland law, medical residents are NOT required to secure medical licensure in order to participate in a medical residency program. See the enclosed extract from the Maryland Code as well as the letters from the Maryland Attorney General's office and from the Maryland Board of Physicians. All this evidence was submitted to the CSC this past spring/summer and was promptly ignored when a one year approval period was given to a resident whose petition had requested the full three years intended for her program.

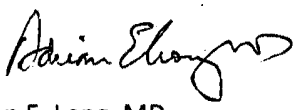
The CSC's ignoring this evidence has caused and is causing problems for St. Agnes and for our residents, i.e., uncertainty, expense, and wasted time and effort, among other things. St. Agnes has to file new petitions when it ought not be required to do so; residents are uncertain as to the legality of their status and often have to apply for new visa stamps to reflect the extended periods of stay.

When we tried a number of years ago to appeal two cases in which the approved period of stay was truncated, our effort was rejected by the CIS because our cases had not been denied, but had been approved, albeit for a shortened period of time. In effect, the CIS's refusal to abide by Maryland law on licensure is unreviewable except in US District Court. Rather than go to litigation, we are hoping that you can require CIS to explain its actions and to honor Maryland law on licensure.

Given the evidence submitted to date that medical residents in Maryland are not required to be licensed or 'approved' in any fashion by the Maryland Board of Physicians, we are at a loss as to why the CIS and its CSC persist in issuing approval notices with abbreviated periods of stay. We welcome your assistance and hope that you will be able to ensure that the CSC's officers are properly trained and that they stop making this process needlessly complex and arbitrary for Maryland employers. We will welcome the chance to discuss this with you and ask you to contact our counsel, Frances O'Connell Taylor, if you have any questions. We are prepared to meet with you and with representatives of CIS, if it will help solve this problem.

Thank you again for your assistance. Please let us know if you have any questions. We hope to hear from you soon as the coming year's residency season will soon be underway and we will, no doubt, suffer the consequences of the CIS's arbitrary adjudication this year unless some corrective measures are implemented.

Yours truly,



Adrian E. Long, MD
Executive Vice President
Chief Medical Officer

BENJAMIN L. CARDIN
UNITED STATES SENATOR
MARYLAND

United States Senate
Washington, DC 20510–2004

February 10, 2015

Mr. Leon Rodriguez
Director
U.S. Citizenship and Immigration Services
425 I Street N.W.
Washington, D.C. 20530

Dear Director Rodriguez:

I am writing regarding a problem involving the USCIS California Service Center and its limits on the H1B sponsorship of medical residents. I have received correspondence from St. Agnes Hospital, and Johns Hopkins University, both stating that the CIS California Service Center has been truncating the approval periods for medical residents by asserting that they require a Maryland medical license in order to participate in the residency program. My constituents argue that this view is not supported by any legislation or regulations, and that the practice has led to inefficiency, needless expenses, and a routine misapplication of the law.

An enclosed extract from the Maryland Code confirms that Maryland law does not require medical residents to secure medical licensure in order to participate in residency programs. I have also enclosed letters from the Maryland Attorney General's office and from the Maryland Board of Physicians, both establishing that its state's medical residents do not need to obtain medical licensure.

Please provide me with a written response to the concerns of my constituents, as well as the expected corrective actions that your agency plans to take. Thank you for your assistance with this request.

Sincerely,

Ben Cardin

Benjamin L. Cardin
United States Senator

Enclosures: 5

Reply To:
☒ 509 Hart Senate Office Building
Washington, DC 20510–2004
(202) 224–4524
www.cardin.senate.gov

Reply To:
☐ Tower 1 Suite 1710
100 S. Charles Street
Baltimore, MD 21201
(410) 962–4436

SAINT AGNES
HOSPITAL

January 23, 2015

The Honorable Ben Cardin
100 S. Charles Street
Tower 1, Suite 1710
Baltimore, MD 21201

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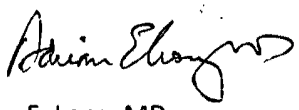
Thank you again for your assistance. Please let us know if you have any questions. We hope to hear from you soon as the coming year's residency season will soon be underway and we will, no doubt, suffer the consequences of the CIS's arbitrary adjudication this year unless some corrective measures are implemented.

Yours truly,



Adrian E. Long, MD
Executive Vice President
Chief Medical Officer

JOHNS HOPKINS UNIVERSITY | Office of International Services

January 15, 2015

100 S. Charles Street
Tower 1, Suite 1710
Baltimore, MD, 21201

Honorable Senator Cardin:

We would like to request the assistance of your office with an issue that we are having with the USCIS California Service Center when we request H-1B visa sponsorship for our Medical Residents.

The California Service Center is limiting the H1B sponsorship of our Medical Residents to 1 year instead of the 2 or 3 years we are requesting in the petition on the grounds that the Resident does not have a permanent medical license.

Clearly, the physician licensure requirements outlined in 8 CFR 214.2(h)(4)(viii)(A) are not intended for Medical Residents. Medical Residents cannot have a permanent medical license in Maryland as they are "in training". They operate under the Medical License of the Residency Program Director and the law is clear that they are not required to secure their own license.

The practice of granting the H-1B for only one year is a financial burden for our institution and a great strain on our personnel as we are forced to apply for H1B status every year.

We appreciate any assistance you can provide in resolving this difficult situation.

Sincerely

Jennifer L. Kerilla

Director, International Scholars
Office of International Services @ JHMI
1620 McElderry Street, Suite 405
Baltimore, MD 21205
jkerill1@jhmi.edu
+1 410-502-7305 (P)
+1 410-955-0871 (F)
http://ois.johnshopkins.edu/index.html

Md. HEALTH OCCUPATIONS Code Ann. § 14-302

*** Current through JR 2 and Ch. 2 of the 2012 General Assembly ***

HEALTH OCCUPATIONS
TITLE 14. PHYSICIANS
SUBTITLE 3. LICENSING

Md. HEALTH OCCUPATIONS Code Ann. § 14-302 (2012)

§ 14-302. Exceptions from licensing -- In general

Subject to the rules, regulations, and orders of the Board, the following individuals may practice medicine without a license:

(1) A medical student or an individual in a postgraduate medical training program that is approved by the Board, while doing the assigned duties at any office of a licensed physician, hospital, clinic, or similar facility;

(2) A physician licensed by and residing in another jurisdiction, while engaging in consultation with a physician licensed in this State;

(3) A physician employed in the service of the federal government while performing the duties incident to that employment;

(4) A physician who resides in and is authorized to practice medicine by any state adjoining this State and whose practice extends into this State, if:

(i) The physician does not have an office or other regularly appointed place in this State to meet patients; and

(ii) The same privileges are extended to licensed physicians of this State by the adjoining state; and

(5) An individual while under the supervision of a licensed physician who has specialty training in psychiatry, and whose specialty training in psychiatry has been approved by the Board, if the individual submits an application to the Board on or before October 1, 1993, and either:

(i) 1. Has a master's degree from an accredited college or university; and

2. Has completed a graduate program accepted by the Board in a behavioral science that includes 1,000 hours of supervised clinical psychotherapy experience; or

(ii) 1. Has a baccalaureate degree from an accredited college or university; and

2. Has 4,000 hours of supervised clinical experience that is approved by the Board.

HISTORY: An. Code 1957, art. 43, § 122; 1981, ch. 8, § 2; ch. 183; 1982, ch. 644; 1988, ch. 109, § 1; 1990, ch. 6, § 11; 1993, ch. 627, § 2; 1994, ch. 620, §§ 1, 2.

Jowett, Haley L

From: Fierro, Joseph
Sent: Tuesday, March 01, 2011 3:16 PM
To: #CSC Division I
Cc: Prince, Rose M; Goodman, Lubirda L; Arganoza-Franciliso, Carmen U; McMahon, Gerald K; Oliver, Jamie D; DeJulius, Robert W; Brokx, John B; Helfer, Wayne D; Mikhelson, Jack; Cameron, Felicia M; Phan, Lethuy; Onuk, Semra K; Dewitty-Davis, Janine L; Robinson, Christopher M; Gooselaw, Kurt G; Lee, Danielle L; Mink, Christine; Abram, John P; Chau, Anna K
Subject: FW: H-1B Guidance for consistency of adjudication

Div 1:

Please see below for guidance pertaining to the adjudication of IBM India and all H-1B petitions.

Thanks,

Joe

From: Richardson, Gregory A
Sent: Tuesday, March 01, 2011 12:36 PM
To: Renaud, Daniel M; Melville, Rosemary; FitzGerald, Karen L; Johnson, Bobbie L
Cc: Canney, Keith J; Laroe, Lisa A; Fierro, Joseph; Sun, Catherina C; Velarde, Barbara Q; Harton, Frank A; Sweeney, Shelly A; Tamanaha, Emisa T; Cox, Sophia
Subject: H-1B Guidance for consistency of adjudication

Service Center Directors,

During recent discussions with both the Vermont and California Service Centers, and after reviewing several IBM India (IBMi) cases, we provide additional clarification on a variety of issues and scenarios that have been presented relative to the IBMi filings.

(b)(7)(e)

Background

[redacted] While these issues have been identified in the context of IBMi adjudications, we want to emphasize that the guidance provided here applies to the adjudication of all H-1B petitions.

Case by Case Adjudication

Adjudicators are reminded that each case must be adjudicated on its own individual merit. While many filings may look similar, especially when filed by the same petitioner, each petition is a unique petition for a separate beneficiary and for differing types of employment. While it is important for adjudicators to be cognizant of fraud patterns for referral to the fraud unit, an adjudicator must carefully examine each petition on its merits and must look at the petition and the evidence submitted in its totality. Adjudicators should resist the urge to formulate hard and fast bright line standards. In one case, a certain piece of evidence might be sufficient to establish eligibility, whereas in a subsequent filing there may be material

discrepancies within the record which will require the adjudicator to ask for additional evidence to resolve such discrepancies.

Standard of Proof

Absent a statute to the contrary in a particular context, the standard of proof that adjudicators must use in the adjudication of employment-based petitions is preponderance of the evidence. If the petitioner submits relevant, probative, and credible evidence that leads the adjudicator to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. The preponderance of the evidence standard does not require the petitioner to provide clear and convincing evidence nor does a mere scintilla of evidence meet the burden. It is a balancing act. Meaning, adjudicators should avoid applying standards that are either too high/rigid or too low/loose. Please refer to the January 11, 2006 memo titled *Alternate definition of "American firm or corporation" for purposes of section 316(b) of the Immigration and Nationality Act, 8 USC 1427(b), and the standard of proof applicable in most administrative immigration proceedings and the Adjudicators Field Manual for further clarification.*

Objectivity

USCIS must *fairly* adjudicate each case on its merits. All petitioners should be held to the same regulatory and statutory requirements that are applicable to them. An adjudicator cannot begin to make assumptions based merely on the size of a petitioning entity and then effectively waive evidentiary requirements because the petitioner is a recognized entity. Again, the nature and extent of the required documentation will depend upon the record in its totality.

Third-party placements

(b)(5)

Specialty occupation

Each H-1B petition must be accompanied by documentation to establish that the beneficiary will be engaged in a specialty occupation. Thus, an adjudicator must be able to determine from the evidence submitted whether 1) the employment being offered is in fact a specialty occupation and 2) whether specialty occupation work is available for the validity period. Both of these issues are of particular importance when the beneficiary will be working at a third-party client

location. Adjudicators are reminded to look at each petition on a case by case basis to ensure that both prongs of the specialty occupation requirement are met.

Thank you,

Greg Richardson
Chief Adjudications Division,
Service Center Operations, USCIS

3

Chong, Jenny

From: Fierro, Joseph
Sent: Thursday, September 19, 2013 8:18 AM
To: Chong, Jenny; Clark, Wendy S; Powell, Trevor; Lugo, Neil I; Galang, Jennifer S; Avetyan, Kurt H; Harvey, Mark E
Subject: FW: AAO Disagrees with CSC on Degree Equivalency in H-1B Petition and Approves Appeal
Attachments: AAO CSC H-1B Sustained.pdf

From: Tamanaha, Emisa T
Sent: Wednesday, September 18, 2013 6:57 PM
To: Fierro, Joseph; Baltaretu, Cristina G
Subject: FW: AAO Disagrees with CSC on Degree Equivalency in H-1B Petition and Approves Appeal

FYI

From: Abram, John P
Sent: Wednesday, September 18, 2013 6:51 PM
To: Tamanaha, Emisa T; Fisher, Sheila C; Ammerman, Michael J; Luna, Maria P (Pilar); Vinet, Richard G; Burford, Mary H
Cc: Campagnolo, Donna P
Subject: AAO Disagrees with CSC on Degree Equivalency in H-1B Petition and Approves Appeal

AAO approved an H-1B petition for an in-house Forensic Alcohol Criminalist, stating that the beneficiary's combination of a three-year bachelor's degree and more than ten years of work experience makes him qualified to perform the duties of the proffered position. Courtesy of Camiel Becker. AILA Doc. No. 13091743.

John Patrick Abram
Chief of Staff
California Service Center
U.S. Citizenship and Immigration Services
Telephone: [redacted]

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

Date: SEP 04 2013 Office: CALIFORNIA SERVICE CENTER FILE: WAC [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

CAMIEL BECKER
BECKER & LEE LLP
220 SANSOME ST., #310
SAN FRANCISCO, CA 94104

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

www.uscis.gov

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner on the Form I-129, Petition for a Nonimmigrant Worker, describes its business as a "Law Practice." The petitioner states that it was established in 1997, currently employs 8 personnel in the United States, and reported a gross annual income of approximately $[redacted] when the petition was filed. It seeks to employ the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, determining that the petitioner: (1) had not established that the proffered position is a specialty occupation; and (2) had not established the beneficiary's eligibility to perform the duties of a specialty occupation.

Upon review of the entire record, we find that the petitioner has overcome the director's grounds for denying this petition. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The totality of the evidence presented in this particular record of proceeding establishes that the duties of the proffered position are so complex or unique that their performance can only be performed by an individual with a baccalaureate or higher degree in a specific specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The petitioner has also established that the position proffered here otherwise meets the requirements of a specialty occupation as that term is defined by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In addition, we have reviewed the qualifications of the beneficiary and find sufficient evidence that he is qualified to perform the duties of the proffered position.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has sustained that burden.

ORDER: The appeal is sustained. The director's January 14, 2013 decision is withdrawn, and the petition is approved.

2. **The Beneficiary's work experience and educational background have also been found equivalent by credible college-level equivalency examinations and thus satisfy the regulatory requirements set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).**

In response to the RFE, the petitioner submitted two evaluations from Dr. and , both of whom have authorization to issue college credit based on a combination evaluation of educational and work experience of students in all fields of study for credited universities. USCIS wrongly disregarded these evaluations based on a finding that the evaluators are not authorized to grant college-level credit for training and work experience pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(1). See January 14, 2013 Notice of Decision, p.12. USCIS erroneously found that these credible evaluators do not possess the necessary qualifications to evaluate foreign degrees pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(1). A fair review of the record evidence indicates that, contrary to the USCIS denial, Dr. and are authorized to assess and issue credit based on a combination of the beneficiary's academic credentials and his work experience.

The Service ignored its own guidelines and the record evidence. Contrary to USCIS's decision, Dr. "is authorized (by the University) to grant credit" based on evaluations of a student's combined educational and work experience. The Adjudicator's Field Manual clarifies that an official must be "formally involved with the college or university's official program for granting credit based on training and/or experience to have the required authority and expertise to make such evaluations." See Adjudicator's Field Manual,

31.3 Section (h). USCIS failed to follow this guidance when it refused to recognize Dr. evaluation based on a combination of the beneficiary's work and educational background.

Professor is head of the University's foreign credential evaluation service and has supplied over 2000 expert opinions on educational credentials. See Exh. 1. His evaluation was accompanied by a letter from the University confirming the following: "(1) That University has a policy of awarding experiential learning credits for professional work experience; (2) That professors, including Professor evaluate such credentials and determine whether University is to award credit based on a student's professional experience; and (3) That Professor , an University faculty member since 2007, is highly proficient and knowledgeable in this process." See Exh. 1. This same letter confirms that Professor holds a Doctorate in Education, but has authorization to issue the above-mentioned equivalency evaluations "in all academic fields as a cross-disciplinary faculty member." Id.

Similarly, USCIS erred when it refused to consider the combination evaluation from possesses similar qualifications, and has trained with granting college-level credit based on educational background and experience combined. See Exh. 2. USCIS ignored a letter included with Ms. 's equivalency which confirms that she holds a professorship at U . and that she is "permitted to evaluate students on behalf of the university ... and issue college credit for work experience in all fields offered at the University." See Exh. 2. Also included with her equivalency evaluations is proof that Mr. helped institute a university program to grant college-level credit for experiential learning following the USCIS 3-for-1 rule. Id. Her evaluation for the beneficiary specifically states that she used the 3-for-1 rule pursuant to 8 CFR 214.2(h)(4)(iii)(D) to reach her findings. She explains:

> "For every three years of relevant and comparable work experiences, we granted up to one year of university study, or 12 years of work experience . . . is considered to be equivalent to a US Regionally Accredited Bachelor's degree . . . The resume listings and the employment verification letters attest a progressively more responsible experience with increasingly complex duties including in the field of forensic (alcohol) criminology for a total of 17 years." Id.

's educational evaluation found Mr. s "combined education and professional experience [to be] equivalent in standing in our opinion to the degree of Bachelor of

Science degree with major in forensic (alcohol) criminology, from a university in the United States of America." See Exh 1 and RFE Response, Exh. L. found the following: "In reviewing s academic history and progressive work experience, it is evident that has satisfied the requirements that are substantially similar to those of an accredited institution of higher education in the United States." See Exh. 2; and RFE Response, Exh. K.

In light of the above, it is clear that and are qualified to evaluate the beneficiary's academic credentials and work experience. USCIS' decision to discard their expertise and their evaluation is clear error and contradicts a plain reading of the regulations.

3. By approving an H-1B petition for this beneficiary in 2009, the Service made a determination that the beneficiary's degree and work experience equates to a four-year degree in criminology, thus satisfying 8 CFR § 214.2(h)(4)(iii)(D)(5).

In 2009, the USCIS Vermont Service Center ("VSC") approved an H-1B petition for this beneficiary filed for a similar position and relying on the same combination of educational background and work experience. See Exh. 3. Approximately three years later, in early 2013, the USCIS California Service Center ("CSC") found that the beneficiary's educational background cannot qualify him for an H-1B. The CSC itself acknowledges that the beneficiary can establish that his degree and experience shall be found equivalent to a US bachelor's degree if the Service determines that the degree and experience are equivalent. CSC, however, failed to acknowledge in its denial that in 2009, the VSC already found the beneficiary's education and work experience sufficient to satisfy the regulatory requirements. It is an abuse of discretion for the Service to make a finding of equivalency in one filing and then contradict its own finding without explanation in a subsequent filing.

In its January 14, 2013 decision, USCIS concluded that it was unable to undergo its own de novo review of the beneficiary's educational background and experience because nothing more than the beneficiary's resume was provided. See January 14, 2013 Notice of Decision, pages 14 and 15. But as discussed above, the record is replete with evidence the USCIS ignored, including the following: (1) A detailed resume documenting many years of progressive experience in the field; (2) Course-by-course transcripts from all university programs; (3) All

degree certificates; and (4) Certificates of completion from various police colleges and police services for multiple training courses demonstrating the beneficiary's progressive experience in the field. In addition, the petitioner filed the following in response to the RFE: (1) Two degree equivalency evaluations from reputable college-degree issuing experts; (2) A more detailed resume of the beneficiary; & (3) Letters of support documenting the beneficiary's progressive experience and recognized expertise in the field. In light of the abundant documentation and evidence submitted, it is puzzling that USCIS was unable to undergo its own determination of degree equivalency. Also, if the Service wanted further evidence to establish the beneficiary's progressive work experience other than what was requested and already provided, it should have requested such evidence in the RFE.

The Service also incorrectly found that the petitioner failed to submit evidence to establish the five criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Per this regulation, USCIS to must make its own independent assessment of degree equivalence, if evidence of at least one of the following is provided:

> (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
> (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
> (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
> (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
> (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The petitioner filed ample evidence to establish 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i),(iii) and (v).

The petitioner filed support letters from industry experts verifying that the beneficiary is a recognized expert in the field. Dr. a professor of Neurology and Pharmacy who has been "often called upon to review a purported expert's professional experience in this field," stated in one letter that he "can personally attest to [the beneficiary's] knowledge and expertise as a Forensic Alcohol Criminalist." Basing his opinion on Mr. 's CV and a professional knowledge his work, Dr. explained:

"Mr. . demonstrates that he has continuously held progressively responsible positions with regard to Forensic Alcohol Criminology. He has continued to obtain education, training and experience very relevant to this field. Over the past decade, Mr. has served as an expert witness for increasing number of law firms, in increasingly higher profile cases. He has gained national recognition as a leader in his field both through his work in criminal cases and through the various educational programs he provided." See RFE Response, Exh. M.

Addressing Mr. s contributions to the field of forensic alcohol criminology, Dr. states:

"Mr. can be said to have made significant contributions to the field of forensic alcohol criminology. He himself has written several articles and publications on Breath Alcohol Testing. These articles and publications have been included in leading industry media. Mr. has also given numerous presentations on the recent developments in forensic alcohol criminology. The issues he discusses often shape the way the forensic alcohol criminalists carry their job." Id.

Another recognized expert and legal consultant for matters involving drugs and alcohol, Dr. also confirmed that USCIS ignored Mr. s recognized expertise in his field:

"Mr. is an expert in the area of alcohol breath testing. He possesses knowledge in the area of the technology and theoretical considerations of the instruments. It is my professional opinion that Mr. is an expert in the area of alcohol breath testing and alcohol toxicology." See RFE Response, Exh. N.

Mr. s Former employers also explain that Mr. gained significant experience while conducting this work, and frequently reference Mr. expertise in the field of Forensic Alcohol Criminology. For instance, DUI defense attorney noted:

"I know of no other breath testing expert in the county that has his depth of knowledge. This combination of education and experience makes him an effective witness for citizens charged with drinking and driving offenses. See RFE Response, Exh. O.1.

Criminal Defense attorney Mr. emphasized that Mr. is known for training DUI defense attorneys who have argued cases in front of the Supreme Court of . He confirmed the following:

"I work with and cross-examine many highly competent scientists, both government and private sector. Mr. equals or surpasses their knowledge of evidentiary breath testing science and equipment." See RFE Response, Exh. O.2.

These support letters from industry experts, former employers, and criminal defense attorneys speak for themselves. USCIS abused its discretion in overlooking substantial record evidence and misapplying the regulations. Its previous finding that the beneficiary's education is equivalent to a US bachelor's in criminology should stand.

V. Conclusion

Based on the aforementioned evidence and information, the petitioner clearly established that the beneficiary qualifies to perform services in a specialty occupation based on a combination of education, specialized training and progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree.

DATED: March 12, 2013

Respectfully submitted,

Camiel Becker
Attorney for Petitioner

U.S. Department of Homeland Security
P.O. Box 10129
Laguna Niguel, CA 92607-1012

U.S. Citizenship and Immigration Services

TO:

DATE: JAN 14 2013

Petition: Form I-129

File: WAC

DECISION

Your Form I-129, Petition for a Nonimmigrant Worker, filed in behalf of has been denied for the following reason(s):

See Attachment

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed with this office within 30 days of the date of this notice. Your appeal must be filed on Form I-290B. A fee of $630.00 is required, payable to U. S. Citizenship and Immigration Services with a check or money order from a bank or other institution located in the United States. If no appeal is filed within the time allowed, this decision will be the final decision in this matter.

In support of your appeal, you may submit a brief or other written statement for consideration by the reviewing authority. You may, if necessary, request additional time to submit a brief. Any brief, written statement, or other evidence not filed with Form I-290B, or any request for additional time for the submission of a brief or other material must be sent directly to:

DHS/USCIS
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

Any request for additional time for the submission of a brief or other statement must be made directly to the Administrative Appeals Office (AAO), and must be accompanied by a written explanation for the need for additional time. An extension of time to file the appeal may not be granted. **The appeal may not be filed directly with the AAO.**

The Small Business Regulatory Enforcement and Fairness Act established the Office of the National Ombudsman (ONO) at the Small Business Administration. The ONO assists small businesses with issues related to federal regulations. If you are a small business with a comment or complaint about regulatory enforcement, you may contact the ONO at www.sba.gov/ombudsman or phone 202-205-2417 or fax 202-481-5719.

Sincerely,

Daniel M. Renaud
Acting Director, California Service Center

Enclosure: Form I-290B
cc: Camiel Becker, Esq.

Form I-292

www.dhs.gov

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Section 214(i)(2) of the Act outlines the fundamental requirements to qualify to perform a specialty occupation:

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C)(i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to Title 8, Code of Federal Regulations ("8 C.F.R.") 214.2(h)(4) (iii)(C) the beneficiary must meet one of the following criteria:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The first issue to be considered in determining whether the beneficiary qualifies for the classification is whether s/he meets any of the criteria listed above in 8 C.F.R. 214.2(h)(4)(iii)(C)(1)-(3).

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The beneficiary does not hold a degree from a United States college or university.

2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The record indicates that the beneficiary studied for approximately three years in a post-secondary setting, but does not establish that the beneficiary holds a foreign degree equivalent to a United States baccalaureate or higher degree in the field of Criminology as required by the proffered position described by the petitioner.

3. Hold an unrestricted State license, registration, or certification which authorized him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

This occupation does not require a State license, registration, or certification.

4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The petitioner is attempting to show that the beneficiary possesses education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. This is the only criterion that the beneficiary could possibly meet.

The second issue to be discussed is whether the beneficiary qualifies under 8 C.F.R. 214.2(h)(4)(iii)(D).

In considering whether the beneficiary qualifies under this category by virtue of his or her education, practical experience and/or specialized training, 8 C.F.R. 214.2(h)(4)(iii)(D) states:

> For purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following: (Emphasis added)
>
> (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Further, 8 C.F.R. 214.2(h)(4)(ii) defines a "recognized authority" as follows:

...a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:

(1) The writer's qualifications as an expert;

(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(3) How the conclusions were reached; and

(4) The basis for the conclusions supported by copies or citations of any research material used.

The petitioner did not show that degree equivalency was being sought for the beneficiary based on the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program ("CLEP"), or Program on Non-collegiate Sponsored Instruction ("PONSI").

Further, the petitioner did not show that degree equivalency was being sought for the beneficiary based on evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

Also, the petitioner is not showing that degree equivalency was being sought for the beneficiary based on a determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Although the petitioner submitted an evaluation from a foreign educational credentials evaluator by the name of Professor on behalf of University , to show that degree equivalency was being sought for the beneficiary based on the beneficiary's foreign education, training, and/or experience, foreign educational credentials evaluators may only evaluate an individual's foreign educational credentials - not training or work experience. Foreign education credentials evaluators do not have the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience as required by the regulation. 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

In the evaluation, the foreign educational credentials evaluator determined that the beneficiary's foreign education is equivalent to three years from an accredited college or university in the United States. This part of the evaluation, that is, the evaluation of the beneficiary's foreign education, is accepted.

However, the USCIS does not accept the assessment of the beneficiary's work experience and other training because, as previously stated, foreign education credentials evaluators are not qualified to make that assessment. Furthermore, foreign educational credentials evaluators are not considered as recognized authorities for the purpose of qualifying aliens under recognition of expertise.

Since the foreign educational credentials evaluation indicated that the beneficiary had less than a baccalaureate level of education in a field of study required by the proffered position, the USCIS requested that the petitioner provide additional evidence to show degree equivalency based on the beneficiary's training and/or work experience as provided in 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), and (4) above.

Furthermore, the petitioner submitted an evaluation of training and/or experience from a private educational evaluation service that was completed by a consultant who asserts to having the authority to grant college level credit at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience to show degree equivalency for the beneficiary.

Although the petitioner has submitted a letter from that claims that Ms. , chief evaluator has the authority to grant the college-level credit for various fields offered at the university ( ). A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. See 8 C.F.R. 214.2(h)(4)(iii)(D)(3). As such, the Career Consulting International evaluation carries no weight in these proceedings. Matter of Sea, Inc., 19 I. & N. Dec. 817 (Comm. 1988).

Furthermore, both evaluator's; Ms. and Professor have not provided sufficient evidence to establish his/her credentials to determine educational equivalency to a bachelor's degree in the particular field of study required for entry into the occupation. Ms. holds a Doctor's degree in Education. Master's degree in Transpersonal Studies, and a bachelor's degree in Sociology. And, Professor holds a Doctor's degree in Education, PhD in Liberal Arts, Master's degree in Business Administration, and a Bachelor's degree in Music. However, the particular field of study required to perform the duties of the proffered position is Criminology, or a related field.

Since the burden of proof to establish eligibility for the benefit sought rests with petitioner who seeks to accord beneficiary's classification, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I. & N. Dec. 190 (Reg. Comm. 1972)

As such, the record fails to establish that the beneficiary is a member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study. Further, the record contains no evidence that the beneficiary holds a state license, registration, or certification that authorizes him or her to practice a specialty occupation.

Moreover, the petitioner has not demonstrated that the beneficiary's training and work experience qualifies as the equivalent of a baccalaureate level of education or higher pursuant to 8 C.F.R. 214(h)(4)(iii)(D)(1), (2), (3), or (4). As such, the only category remaining under which the beneficiary might possibly qualify would be 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

Evaluation of experience by USCIS

When the petitioner fails to establish that the beneficiary's training and work experience qualifies as the equivalent of a baccalaureate level of education or higher pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(1), the USCIS may make its own independent assessment of the beneficiary's credentials.

In its independent assessment of the beneficiary's past employment experience for equivalency to the attainment of a baccalaureate or higher degree or its equivalent, the USCIS is guided by the regulations at 8 C.F.R. 214.2(h)(4)(iii)(D)(5) as previously shown above.

An acceptable evaluation should describe the material evaluated and establish that the areas of experience are related to the specialty. A resume or curriculum vitae alone is insufficient to satisfy equivalency of a baccalaureate level of education based on training and/or experience. In this case, it appears that the evaluation is based, to a large extent, on a copy of the beneficiary's resume and is insufficient to establish equivalency in the claimed specific specialty.

Without supplemental information, it is not possible to determine how the evaluator reached his/her conclusion that the beneficiary has the equivalent of a U.S. baccalaureate or higher degree in the claimed specialty occupation.

No Recognition of Expertise

In addition to establishing equivalency, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentation shown in 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v), as follows:

> **(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;**

The petitioner did not submit sufficient evidence to support the beneficiary's eligibility under this regulation.

The petitioner has submitted letters from former colleagues, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i), were found inadequate.

> **(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;**

The petitioner did not submit any evidence to establish that the beneficiary is the member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study to establish his/her recognition of expertise in the field of study required by the proffered position.

> **(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;**

The petitioner did not submit sufficient evidence to establish that there has ever been any published material by or about the beneficiary to establish his/her recognition of expertise in the field of study required by the proffered position.

> **(iv) Licensure or registration to practice the specialty occupation in a foreign country; or**

The petitioner did not submit any evidence to establish that the beneficiary is licensed or registered to practice in the proffered position.

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The petitioner did not submit any evidence from a recognized authority who has determined that the beneficiary's achievements in the field of the specialty occupation are significant.

The evaluation provided by the foreign educational credentials evaluator is not sufficient to establish recognition of expertise because, as previously stated, they are not considered recognized authorities for the purpose of qualifying under recognition of expertise. In this case the evaluator does not hold a degree in the field related to the proffered position. Also, the record does not establish the evaluator's qualifications as an expert, his or her experience giving such opinions that have been accepted as authoritative and by whom, and the basis for conclusions supported by copies of citations of any research material as required in 8 C.F.R. 214.2(h)(4)(ii).

As such, the petitioner has not established that the beneficiary qualifies to perform the services of the specialty occupation through equivalency to completion of a United States baccalaureate or higher degree in the specialty occupation based on education, training and/or employment experience pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D). Therefore, the beneficiary is ineligible for classification as an alien employed in a specialty occupation.

The burden of proof to establish eligibility for a desired preference rests with you, the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

petitioner's statements about the requirement that the individual will independently review the work product of other professionals. USCIS also ignored evidence that the individual in this position must be qualified as an expert in court to testify about his or her findings.

B. THE BENEFICIARY'S THREE YEAR DEGREE AND MANY YEARS OF EXPERIENCE ARE EQUAL TO THAT OF A FOUR YEAR DEGREE IN CRIMINOLOGY OR A RELATED FIELD.

1. The Regulatory Requirements for Degree Equivalency for Specialty Occupation Workers.

To qualify for an H-1B, a beneficiary must meet one of the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(C). Namely, the beneficiary must: (1) Hold a US bachelor's or higher; (2) Hold a foreign degree determined to be equivalent to a US bachelor's degree or higher required by the specialty occupation; (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation; or (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. Here, the petitioner claims only that the beneficiary has satisfied the last requirement, i.e., that the beneficiary's three-year degree and many years of progressive work experience are equivalent to at least a four-year US bachelor's degree in criminology or a related field.

The regulations outline how a beneficiary's work history and educational background can be found equivalent to a US bachelor's degree. 8 C.F.R. § 214.2(h)(4)(iii)(D) states that the equivalence to completion of a United States bachelor's degree or higher degree "shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

> (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

Chong, Jenny

From: Baltaretu, Cristina G
Sent: Friday, January 10, 2014 4:17 PM
To: Nicholson, Roya Z; Matthews, Steven D; Murillo, Gustavo; Cartwright, Charity R; Culhane, Dennis J; Luu, Ken W; Vitug, Ella C
Cc: Chong, Jenny
Subject: FW: E-E Relationship and Validity Periods
Attachments: Employer-Employee Memo010810.pdf

Sups,

As we and the seniors have discussed during previous H1B trainings - including the Preponderance Training, Preponderance Practicums, and this month's H1B Roundtables can you kindly remind officers that Bobbie's email guidance was not meant to limit validity periods to less than three years in cases where there is no end/termination date in the contract or end-client letter?

The final adjudicative decision should be based on the totality and evidence provided with each case.

Thanks,
Cristina

From: Johnson, Bobbie L
Sent: Wednesday, July 28, 2010 8:28 AM
To: Perkins, Robert M; Gooselaw, Kurt G; Nguyen, Carolyn Q
Cc: Velarde, Barbara Q; Kramar, John; Renaud, Daniel M; Hazuda, Mark J; Sweeney, Shelly A
Subject: E-E Relationship and Validity Periods
Importance: High

VSC and CSC:

We have discussed the issue of validity periods with OCC and SCOPS management. OCC and SCOPS agree that we should treat all petitioners equally. We should not have any special guidance or practice specific to any particular company. As such this instruction applies to all H-1B petitions (including Cognizant).

In general, the adjudicator does not need to issue an RFE if the petition initially contains evidence of an employer-employee relationship but the evidence does not cover the full period of time requested on the petition. The petition's validity should be limited to the time period of qualifying employment established by the evidence. Per previous instruction, if evidence is submitted for less than a year, the petition should be given a one-year validity period.

However, there may still be instances in which the adjudicator determines that an RFE for evidence of the employer-employee relationship for the full validity period is necessary. In addition, SCOPS would like to provide the following instruction for the below situations:

- the full validity period requested will be provided if the contract/end-client letter indicates that there is an automatic renewal clause (depending on the totality of the circumstances in the petition, an RFE may be issued if the contract/end-client letter is outdated);
- an RFE should be issued if it is evident that the end/termination date was clearly redacted from the contract/end-client letter; and
- an RFE may be issued if there is no end/termination date in the contract or end-client letter (this should be on a case-by-case basis if we can articulate a reason to believe that the beneficiary will be benched).

On a separate note, we do not think that the Service Centers should be put in the position of having to set up meetings with individual attorneys or companies on questions regarding Agency policy. If you receive inquiries from individual firms

and/or companies requesting such a meeting on validity periods or any other issues regarding the employer-employee relationship, please direct them to SCOPS and notify us of the interested party(ies).

Please let us know if you have any questions. Thanks.

Bobbie

Bobbie L. Johnson
Branch Chief
Business Employment Services Team 2
Service Center Operations, USCIS
[redacted]

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Service Center Operations Directorate
Washington, DC 20529-2060

U.S. Citizenship and Immigration Services

JAN 0 8 2010

HQ 70/6.2.8
AD 10-24

Memorandum

TO: Service Center Directors

FROM: Donald Neufeld
Associate Director, Service Center Operations

SUBJECT: Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements

Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)

I. Purpose

This memorandum is intended to provide guidance, in the context of H-1B petitions, on the requirement that a petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

II. Background

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA) defines an H-1B nonimmigrant as an alien:

> who is coming temporarily to the United States to perform services...in a specialty occupation described in section 1184(i)(1)..., who meets the requirements of the occupation specified in section 1184(i)(2)..., and with respect to whom the Secretary of Labor determines and certifies...that the intending employer has filed with the Secretary an application under 1182(n)(1).

The Code of Federal Regulations (C.F.R.) provides that a "United States employer" shall file an [H-1B] petition. 8 C.F.R. 214.2(h)(2)(i)(A).

The term "United States employer", in turn, is defined at 8 C.F.R. 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:
(1) Engages a person to work within the United States;
(2) Has an **employer-employee relationship** with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
(3) Has an Internal Revenue Service Tax identification number.

In support of an H-1B petition, a petitioner must not only establish that the beneficiary is coming to the United States temporarily to work in a specialty occupation but the petitioner must also satisfy the requirement of being a U.S. employer by establishing that a valid employer-employee relationship exists between the U.S. employer and the beneficiary throughout the requested H-1B validity period. To date, USCIS has relied on common law principles[1] and two leading Supreme Court cases in determining what constitutes an employer-employee relationship.[2]

The lack of guidance clearly defining what constitutes a valid employer-employee relationship as required by 8 C.F.R. 214.2(h)(4)(ii) has raised problems, in particular, with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. The placement of the beneficiary/employee at a work site that is not operated by the petitioner/employer (third-party placement), which is common in some industries, generally makes it more difficult to assess whether the requisite employer-employee relationship exists and will continue to exist.

While some third-party placement arrangements meet the employer-employee relationship criteria, there are instances where the employer and beneficiary do not maintain such a relationship. Petitioner control over the beneficiary must be established when the beneficiary is placed into another employer's business, and expected to become a part of that business's regular operations. The requisite control may not exist in certain instances when the petitioner's business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs. Such placements are likely to require close review in order to determine if the required relationship exists.

Furthermore, USCIS must ensure that the employer is in compliance with the Department of Labor regulations requiring that a petitioner file an LCA specific to each location where the

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[1] USCIS has also relied on the Department of Labor definition found at 20 C.F.R. 655.715 which states: *Employed, employed by the employer, or employment relationship* means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB* v. *United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

[2] Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-323 (1992) (hereinafter Darden) and Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440 (2003) (hereinafter Clackamas).

beneficiary will be working.[3] In some situations, the location of the petitioner's business may not be located in the same LCA jurisdiction as the place the beneficiary will be working.

III. Field Guidance

A. The Employer-Employee Relationship

An employer who seeks to sponsor a temporary worker in an H-1B specialty occupation is required to establish a valid employer-employee relationship. USCIS has interpreted this term to be the "conventional master-servant relationship as understood by common-law agency doctrine."[4] The common law test requires that all incidents of the relationship be assessed and weighed with no one factor being decisive. The Supreme Court has stated:

> *we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.*[5]

Therefore, USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[6] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (with no one factor being decisive):

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
(2) If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
(3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

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[3] See 20 C.F.R. 655.730(c)(4)(v), 20 C.F.R. 655.730(c)(5) and 20 C.F.R. 655.730(d)(1)(ii)
[4] See Darden at 322-323.
[5] See Darden at 323-324 (Emphasis added.)
[6] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
(7) Does the petitioner claim the beneficiary for tax purposes?
(8) Does the petitioner provide the beneficiary any type of employee benefits?
(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship test, if, in the totality of the circumstances, a petitioner is able to present evidence to establish its right to control the beneficiary's employment. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

Valid employer-employee relationship would exist in the following scenarios:[7]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic location of the employer to

[7] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Specified and Actual Control is Exercised]

The following scenarios would not present a valid employer-employee relationship:[8]

Self-Employed Beneficiaries

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee

[8] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[9] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[10]

[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.

[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company's payroll. Once placed at

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[9] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[10] In the past, the Administrative Appeals Office (AAO) has issued a limited number of unpublished decisions that addressed whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, similar to the 1979 decision in *Matter of Allan Gee, Inc.*, the AAO did not reach the question of how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." 17 I&N Dec. 296 (Reg. Comm. 1979). While it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee. Starting in 2007, the AAO has utilized the criteria discussed in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) and *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) to reach this pivotal analysis.

the client company, the beneficiary reports to a manager who works for the third-party company. The beneficiary does not report to the petitioner for work assignments, and all work assignments are determined by the third-party company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. The beneficiary's end-product, the payroll, is not in any way related to the petitioner's line of business, which is computer consulting. The beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control].

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[11]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[12] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the

[11] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers. However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.

[12] See 8 C.F.R. 214.2(h)(9)(i).

employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[13] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the

[13] See 8 C.F.R. 214.2(h)(4)(ii).

petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;
- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

2. Extension Petitions[14]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of Time Sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or
- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

[14] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.

IV. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable

at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

V. Contact

Any questions regarding the memorandum should be directed through appropriate supervisory channels to the Business Employment Services Team in the Service Center Operations Directorate.

AFM UPDATES

Accordingly, the *AFM* is revised as follows:

1. Section (g)(15) of Chapter 31.3 of the *Officer's Field Manual* is added to read as follows:

31.3 H-1B Classification and Documentary Requirements

***

(g) Adjudicative Issues

(15) Evidence of Employer-Employee Relationship

USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[1] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (with no one factor being decisive):

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
(2) If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
(3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

[1] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
(7) Does the petitioner claim the beneficiary for tax purposes?
(8) Does the petitioner provide the beneficiary any type of employee benefits?
(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship test, if, in the totality of the circumstances, a petitioner is able to present evidence to establish its right to control the beneficiary's employment. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

Valid employer-employee relationship would exist in the following scenarios:[2]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic

[2] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

location of the employer to perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Specified and Actual Control is Exercised]

The following scenarios would not present a valid employer-employee relationship:[3]

Self-Employed Beneficiaries

[3] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[4] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[5]
[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.
[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company's payroll. Once placed at the client company, the beneficiary reports to a

[4] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[5] The Administrative Appeals Office (AAO) of USCIS has issued an unpublished decision on the issue of whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions of the AAO correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, the unpublished AAO decision did not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." The AAO decision did not reach this pivotal analysis and thus, while it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee.

manager who works for the third-party company. The beneficiary does not report to the petitioner for work assignments, and all work assignments are determined by the third-party company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. The beneficiary's end-product, the payroll, is not in any way related to the petitioner's line of business, which is computer consulting. The beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control]

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[6]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[7] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the

[6] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers. However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.
[7] 8 C.F.R. 214.2(h)(9)(i)

employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[8] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools

[8] See 8 C.F.R. 214.2(h)(4)(ii).

needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;

- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

2. Extension Petitions[9]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of Time Sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or

[9] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit a complete

itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.

Jowett, Haley L

From: Steele, Jenny B
Sent: Wednesday, July 28, 2010 11:10 AM
To: #CSC Division II; Elias, Erik Z; Devera, Jennie F; Harvey, Mark E; Chong, Jenny; Mikhelson, Jack; Ecle, Lynette C; Avetyan, Kurt H; Moran, Karla; Trinh, Nhut
Cc: Gooselaw, Kurt G; Nguyen, Carolyn Q
Subject: E-E Relationship and Validity Periods

Importance: High

This email supersedes any and all previous guidance on H-1B validity periods. As such the instruction below applies to all H-1B petitions including Cognizant.

In general, the adjudicator does not need to issue an RFE if the petition initially contains evidence of an employer-employee relationship but the evidence does not cover the full period of time requested on the petition. The petition's validity should be limited to the time period of qualifying employment established by the evidence. Per previous instruction, if evidence is submitted for less than a year, the petition should be given a one-year validity period.

However, there may still be instances in which the adjudicator determines that an RFE for evidence of the employer-employee relationship for the full validity period is necessary. In addition, SCOPS has provided the following instruction for the below situations:

- the full validity period requested will be provided if the contract/end-client letter indicates that there is an automatic renewal clause (depending on the totality of the circumstances in the petition, an RFE may be issued if the contract/end-client letter is outdated);
- an RFE should be issued if it is evident that the end/termination date was clearly redacted from the contract/end-client letter; and
- an RFE may be issued if there is no end/termination date in the contract or end-client letter (this should be on a case-by-case basis if we can articulate a reason to believe that the beneficiary will be benched).

Should you have any further questions or concerns regarding H-1B validity periods, please see your supervisor and/or ACD. Thanks.

Chong, Jenny

From: Tamanaha, Emisa T
Sent: Thursday, November 21, 2013 8:11 PM
To: Chong, Jenny
Subject: FW: E-E Relationship and Validity Periods
Attachments: Employer-Employee Memo010810.pdf

FYI

From: Fierro, Joseph
Sent: Thursday, November 21, 2013 1:34 PM
To: Aucoin, Lauren J
Cc: Tamanaha, Emisa T; Baltaretu, Cristina G; Sweeney, Shelly A
Subject: E-E Relationship and Validity Periods

Lauren:

We decided that it is best that we not add to the email guidance from Bobbie Johnson and simply relate to the officers and supervisors that generally the email guidance was not meant to limit validity periods to less than three years in cases where there is no end/termination date in the contract or end-client letter.

We will go forward with this understanding and through our supervisory, team, and section meetings will reinforce the meaning of this guidance. Additionally we will continue to work with the teams through training, mentoring and roundtables to gain full understanding and consistency in the center on this and all issues.

Thanks,

(b)(6)

Joe

[redacted]

From: Johnson, Bobbie L
Sent: Wednesday, July 28, 2010 8:28 AM
To: Perkins, Robert M; Gooselaw, Kurt G; Nguyen, Carolyn Q
Cc: Velarde, Barbara Q; Kramar, John; Renaud, Daniel M; Hazuda, Mark J; Sweeney, Shelly A
Subject: E-E Relationship and Validity Periods
Importance: High

VSC and CSC:

We have discussed the issue of validity periods with OCC and SCOPS management. OCC and SCOPS agree that we should treat all petitioners equally. We should not have any special guidance or practice specific to any particular company. As such this instruction applies to all H-1B petitions (including Cognizant).

In general, the adjudicator does not need to issue an RFE if the petition initially contains evidence of an employer-employee relationship but the evidence does not cover the full period of time requested on the petition. The petition's validity should be limited to the time period of qualifying employment established by the evidence. Per previous instruction, if evidence is submitted for less than a year, the petition should be given a one-year validity period.

However, there may still be instances in which the adjudicator determines that an RFE for evidence of the employer-employee relationship for the full validity period is necessary. In addition, SCOPS would like to provide the following instruction for the below situations:

- the full validity period requested will be provided if the contract/end-client letter indicates that there is an automatic renewal clause (depending on the totality of the circumstances in the petition, an RFE may be issued if the contract/end-client letter is outdated);
- an RFE should be issued if it is evident that the end/termination date was clearly redacted from the contract/end-client letter; and
- an RFE may be issued if there is no end/termination date in the contract or end-client letter (this should be on a case-by-case basis if we can articulate a reason to believe that the beneficiary will be benched).

On a separate note, we do not think that the Service Centers should be put in the position of having to set up meetings with individual attorneys or companies on questions regarding Agency policy. If you receive inquiries from individual firms and/or companies requesting such a meeting on validity periods or any other issues regarding the employer-employee relationship, please direct them to SCOPS and notify us of the interested party(ies).

Please let us know if you have any questions. Thanks.

Bobbie

Bobbie L. Johnson
Branch Chief
Business Employment Services Team 2
Service Center Operations, USCIS
[redacted]

(b)(6)

Nguyen, Dang H

From: Shuttle, Peter J
Sent: Thursday, September 23, 2010 9:25 AM
To: Janson, Nancy D; Beauregard, Pamela R; Bolog, Marguerite M; Bouchard, Armanda M; Hoffman, Margaret A; Howrigan, Tanya L
Subject: FW: Time limitations for chile/singapore H1b requesting regualr H1B

FYI

Peter Shuttle
USCIS - VSC
Assistant Center Director AG-3
802-527-4786 / cell: 802-734-1229

From: Sweeney, Shelly A
Sent: Thursday, September 23, 2010 12:05 PM
To: Shuttle, Peter J
Cc: Doherty, Shannon P
Subject: RE: Time limitations for chili/singapore H1b requesting regualr H1B

Pete,

Per OCC, H-1B1 is a separate classification from H-1B, and 8 CFR 214.2(h)(13)(B) is not applicable to H-1B1s. Therefore, an individual seeking to change status from H-1B1 to H-1B who has been in the US for more than 6 years, would not have to be abroad for one year before applying for an H-1B.

Thanks!

Shelly

From: Sweeney, Shelly A
Sent: Thursday, September 23, 2010 10:49 AM
To: Shuttle, Peter J
Cc: Doherty, Shannon P
Subject: RE: Time limitations for chili/singapore H1b requesting regualr H1B

Pete,

I followed up with OCC on this question this morning. They hope to have an answer today. I will forward the answer along as soon as I get it. I will be out of the office tomorrow and Monday. Shannon will keep checking in with OCC if we don't get an answer today since the PP clock expires on Tuesday.

Thanks!

Shelly

From: Sweeney, Shelly A
Sent: Monday, September 20, 2010 11:57 AM
To: Shuttle, Peter J
Subject: RE: Time limitations for chili/singapore H1b requesting regualr H1B

Yes, I'll shoot this to HQ.

Peter Shuttle

USCIS - VSC

Assistant Center Director AG-3

(b)(6)

[redacted]

From: Beauregard, Pamela R [mailto:pamela.beauregard@dhs.gov]
Sent: Thursday, September 16, 2010 11:07 AM
To: Shuttle, Peter J
Cc: Bouchard, Armanda M; Bolog, Marguerite M; Howrigan, Tanya L
Subject: Time limitations for chili/singapore H1b requesting reguair H1B

Pete,

Is it possible to get clarification from SCOPS on the following:

Beneficiary is currently in Chili/Singapore H-1B (HSC) status. The petitioning company is requesting that they now be allowed to change status to regular H-1B. The officer issued an RFE regarding the petitioning company's requested validity dates because the time requested, if granted in full, would be in excess of 6 years, counting the time spent in HSC status. The response back was that the time in HSC status did not count toward the 6 year limit.

214.2(h)(13)(B) does not distinguish between HSC H-1B and regular H-1B status (nor does 214.2(l)(12), both just categorize H and /or L status).

It would seem to be an unfair practice to count the HSC time, as they are renewable in one year increments, indefinitely and I do not interpret the applicable sections of 8 CFR as definitive, I could interpret it either way.

Thanks,

Pam

(b)(6)

Pamela R. Beauregard|Senior Adjudications Officer (ISO 3)| Vermont Service Center |USCIS | ([redacted]) [redacted] pamela.beauregard@dhs.gov

original addressees without prior authorization of the originator.

Nguyen, Dang H

From:	Gooselaw, Kurt G
Sent:	Tuesday, April 27, 2010 8:54 AM
To:	#CSC Division II
Cc:	Nguyen, Carolyn Q; Dela Cruz, Charity R; Dyson, Howard E; Onuk, Semra K; Steele, Jenny B; Torres, Lory C; Wolcott, Rachel A
Subject:	Meeting 4/22

In response to last Thursday's meeting this is being issued for clarification. This is solely guidance and not a policy memorandum and this is not to be quoted or used in RFEs or distributed to the public. Here are some bullets for your reference to assist with O and H1B adjudication. Should you have questions, please discuss with you supervisors.

Thanks

- O-1 itineraries – As discussed yesterday events and a series of events can be considered one event. There is no day gap threshold in determining whether two or more related events constitute one event for the validity period. You must evaluate, given the facts, whether a gap in time is reasonable and all events or series of events are related in order to be considered one event. This is a case-by-case determination given the totality of the evidence. For example – should a beneficiary be scheduled to perform at more than two venues look to the purpose and scope of the performance and verbiage describing what the beneficiary will be doing between performances in order to evaluate whether the two or more performances can be considered one event. There is no 45 day rule. We will evaluate these in a way that is beneficial to the petitioner and use a reasonable approach. However, should two performances be so far apart that it appears that each performance is one separate event, we will RFE first to allow the petitioner to describe what the beneficiary will be doing between these two or more performances before making a final decision.

- Sustained acclaim – Sustained acclaim is demonstrated by receiving a major internationally recognized award (O-1A). For O-1B arts the beneficiary must have received or been nominated for a significant national or international award or prizes. If not, the beneficiary may qualify by **adequately** meeting 3 of the 8/6 (O1A and O1B arts) regulatory prongs. The prongs are setup to weigh whether or not someone has demonstrated sustained acclaim and meet the O-1 threshold. There was a totality review adjudication discussion, however, we will continue to adjudicate and ensure that the evidence submitted meets that established level for the prongs in order to determine whether the beneficiary qualifies for O-1. Should the petitioner demonstrate the beneficiary **adequately** (more likely than not) meets the 3 of the 8/6 prongs, the case should be approved.

- O-1B Arts – The evidentiary standard is **prominence, well known or leading** in the field of arts. When evaluating evidence that falls within each prong, this standard needs to be applied. O-1B arts has the lowest standard of the three O-1 classification types.

- O-1B Motion Picture/TV – Receipt or nomination of a significant international/national award (including but not limited to Academy Award, an Emmy, a Grammy, or a Director's Guild Award) in this category is sufficient to establish the beneficiary qualifies for this O-1 classification type without additional evidence to show a demonstrated record of achievement. The evidentiary standard is **outstanding, notable or leading in the motion picture or television field**. If an award is not shown when evaluating evidence that falls within each prong this standard needs to be applied. O-1B motion picture/television has the second lowest standard of the three O-1 classification types.

- O-1 comparable evidence – Should evidence be submitted where it cannot be considered a significant award or evidence that does not readily fit into the prongs, such evidence should be considered and analyzed in accordance with the set standards. It should be noted that there is no provision in the regulations for comparable evidence in the motion picture and television category.

- One hit wonders – these are usually few and far between. However, if a beneficiary received a significant award 30 years ago and did not continue in their field of endeavor this may call into question whether the beneficiary actually meets the standard. This would need to be evaluated on a case-by-case basis.

- H-1B offsite employment initial filing (change of employer) – Should the petitioner have a well-established filing practice or track record with USCIS – unlike H-1B dependent employers, 10/25/10 employers, and CFDO returns with Statement of Findings – an employment support letter (written by the petitioner) and itinerary is sufficient as long as it shows the job description, right of control and validity period of the position. With this evidence it is more likely than not the petitioner has met its burden for the employer-employee relationship aspect and you **have the discretion** to accept this evidence as meeting the EE standard. All other issues such as maintenance of status, beneficiary qualifications, specialty occupation must also be evaluated independently on other evidence. Should the case be approvable in all respects and the itinerary states the validity period and matches what is requested on the petition and LCA, we should use that period of time period as the validity period.

- H-1B offsite employment (initial) continued – Should the employment letter fail to include the pertinent information discussed above and/or the petitioner does not have a well-established filing practice or track record, see above for examples, you would need to evaluate the evidence and identify the deficiencies. You should issue an RFE, but you would need to articulate what was received and what the deficiencies are. In this situation the RFE needs to include the evidence as bulleted in the template.

- Contracts – If a contract combined with the statement of work (SOW), addenda, end user client letter, service agreements, etc. is present the validity within those documents controls the end date. If it is shorter than one year, issue an RFE and provide the petitioner with an opportunity to submit evidence for the full period requested. If an RFE has already been issued for these documents, a second RFE is not needed. If less than one year is shown, then provide one year. If more than one year provide that time as long as the beneficiary is eligible. Should there be a range we would give the shorter period. If the shorter period is less than one year we would provide one year.

- EOS with the same employer – As long as the petitioner can establish that it continues to meet all the regulatory H-1B requirements the case should be approved. If the EOS does not indicate regulatory compliance an RFE is warranted and use the RFE template accordingly.

- EOS with a new petitioner – see above on initial filings.

- Self-petitioning H-1Bs and O-1s – Self-petitioning H-1Bs need to be brought to your supervisor with the intended decision – no clerical or C3 updates. O-1self-petitioners can be adjudicated but do not use H-1B language or the EE memo in your adjudication. The regulation for Os is clear that an O-1 beneficiary cannot self-petition and does not qualify as a US employer.

Nguyen, Dang H

From: Adams, Shawn M
Sent: Tuesday, November 03, 2009 8:49 AM
To: Zhang, Janet T; Kurniadi, Sanlyati; Hong, Yen; Mendez, Christopher M; Delfosse, Ryan J; Makabali, Michelle L; Reid, Brett M; Chung, Jae M; Nguyen, Dang H
Subject: FW: Advance parolees

FYI

Shawn Adams

From: Gooselaw, Kurt G
Sent: Tuesday, November 03, 2009 8:45 AM
To: Adams, Shawn M; Dyson, Howard E; Nicholson, Roya Z; Steele, Jenny B; Torres, Lory C; Wolcott, Rachel A
Cc: DeJulius, Robert W
Subject: FW: Advance parolees

See below. If there is no time left on the I-797 after the bene has been given advanced parole, then the officer should issue a split decision.

From: Nguyen, Carolyn Q
Sent: Tuesday, November 03, 2009 8:42 AM
To: Gooselaw, Kurt G
Cc: Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Moran, Karla
Subject: RE: Advance parolees

I agree that the EOS should be denied if there's no time left on the previous I-797 approval.

From: Gooselaw, Kurt G
Sent: Tuesday, November 03, 2009 8:11 AM
To: Nguyen, Carolyn Q
Subject: FW: Advance parolees
Importance: High

Carolyn,
Please advise if Div I will conform to this adjudication – split decision if there is no time left on the I-797 approval?

From: DeJulius, Robert W
Sent: Tuesday, November 03, 2009 6:13 AM
To: Sweeney, Shelly A; Bouchard, Armanda M
Cc: Young, Claudia F; Gooselaw, Kurt G; Nguyen, Carolyn Q; Perkins, Robert M
Subject: RE: Advance parolees

Thanks Shelley.

I feel an attorney will eventually challenge us for denying an EOS on an AP admissions request, not requesting an EOS (for those who have EAD authorization) , especially if CBP grants admission to these requests. But I guess we'll see what happens if that occurs. We are really in a catch 22 situation on this.

Robert DeJulius
SrAO

From: Sweeney, Shelly A
Sent: Monday, November 02, 2009 7:03 AM
To: DeJulius, Robert W; Bouchard, Armanda M
Cc: Young, Claudia F; Gooselaw, Kurt G; Nguyen, Carolyn Q; Perkins, Robert M
Subject: RE: Advance parolees

Bob and Mandy,

As you noted, Bob, the Cronin dual intent memo does state that a final rule will supersede the memo, but I cannot locate where a final rule was ever published. It looks like Cronin is all we have to work with right now.

With regards AOS advanced parole, the Cronin memo specifically states that an EOS request can be made only if there is a "valid and approved petition." As such, I tend to agree with the attached VSC AOS parole guidance. Petitions where the EOS request is filed after the expiration of the H-1B petition could be reviewed under the provisions of 8 CFR 214.1(c)(4).

As for maintenance of status for EOS, the Cronin memo states that until the final rule is published "the Service will not consider a paroled adjustment applicant's failure to obtain a separate employment authorization document to mean that the paroled adjustment applicant engaged in unauthorized employment by working for the H-1 or L-1 employer between the date of his or her parole and the date to be specified in the rule." I interpret this to read that the alien can still work for the H-1B employer after he was admitted as an AOS parolee as long as the original petition is still valid even if he doesn't have a separate EAD. I would still say that 8 CFR 214.2(h)(13) kicks in after the original petition validity expires.

In the situation originally laid out by the CSC where the beneficiary has received a grant of advanced parole not AOS-related and therefore not covered by Cronin (ie. humanitarian) and both the original H-1B petition and the advanced parole I-94 have expired, I again tend to agree with the VSC that any COS/EOS would be denied and the petition would be forwarded for consular processing (unless the petitioner can demonstrate that discretion should be applied under 8 CFR 214.1(c)(4) or 8 CFR 248.1(b)). I don't think we want or even can get into the habit of admitting someone.

If you have any questions/comments/concerns, please email me (and make sure you copy Claudia).

Thanks!

Shelly

From: DeJulius, Robert W
Sent: Thursday, October 29, 2009 12:43 PM
To: Bouchard, Armanda M; Sweeney, Shelly A
Cc: Howrigan, Tanya L; Bolog, Marguerite M; Shuttle, Peter J; Perkins, Robert M; Gooselaw, Kurt G; Brolox, John B; Helfer, Wayne D; Onuk, Semra K; Phan, Lethuy; Adams, Shawn M; Dyson, Howard E; Nicholson, Roya Z; Steele, Jenny B; Torres, Lory C; Tran, Helen; Wolcott, Rachel A; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Ellas, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Moran, Karla; Nguyen, Carolyn Q
Subject: RE: Advance parolees

Thanks Armanda,

Again, my worry is the effect of these memos when they say "until a final rule is published". Where is the final rule? And all these memos deal with a denial of the extension, which would be at the post admission stage. If we deny their request for admission. then there would be no need for a denial of an extension. If we admit them, why

then, would we deny their extension? We need to wrap our heads around this and I would like to get a policy established in the SOP before a savvy attorney files against one of these split decisions and we have to defend a denial of an extension when one is not being requested.

Shelley, maybe counsel needs to look at this before we establish a policy so we are on firm ground. Sorry to be such a worry wart, but this stems from my experience with immigration attorneys. And I would not be unhappy if we were advised not to accept these anymore.

Robert DeJulius
SrAO

From: Bouchard, Armanda M
Sent: Thursday, October 29, 2009 3:20 AM
To: DeJulius, Robert W; Sweeney, Shelly A
Cc: Howrigan, Tanya L; Bolog, Marguerite M; Shuttle, Peter J; Perkins, Robert M
Subject: RE: Advance parolees

Bob,

Given that a parole is not an admission, I understand how CSC looks to adjudicate this scenario as an admission. Also, without an admission there is no nonimmigrant status to extend or change from, so VSC looks at this as a status issue, with the 5/25/00 Cronin memo on AOS parolees being an exception. We look at whether the alien has any status to extend or change, depending what they have requested on the I-129. If the reason for parole is AOS, then we follow the 5/25/00 Cronin memo. If the parole is for some other reason, such as humanitarian parole, then they do not have any status to extend or change, therefore we would not grant any EOS or COS, but could grant an approval for consular notification if they qualified for the classification. I would contact the POE to inquire on what grounds they have admitted an alien if the advanced parole has expired and the reason for parole is not clear.

(b)(6)

Armanda Bouchard| DHS| USCIS | Vermont Service Center | Senior Adjudications Officer [redacted] Armanda.Bouchard@dhs.gov

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From: DeJulius, Robert W
Sent: Wednesday, October 28, 2009 9:17 AM
To: Bouchard, Armanda M; Sweeney, Shelly A
Cc: Howrigan, Tanya L; Bolog, Marguerite M; Shuttle, Peter J; Perkins, Robert M
Subject: RE: Advance parolees

Armanda,

This is the problem we are seeing. The previous H1B status expired. Now the alien as been admitted as an advance parolee and the petitioner's I-129 is not officially requesting an EOS (even if they mark this on the petition) as they are in a current authorized stay as an advance Parolee and are requesting admission as an H1B. We are now acting as an inspector at admissions would, either granting or denying admission. Because

they are requesting admission as an H1B, there is no EOS to deny. We'd like more info on how CBP handles these and what they base the decision on (work authorization??). To the best of my knowledge, in a two step process, they admit them, then once admitted as an H1B, they grant them validity.

Robert DeJulius
SrAO

From: Bouchard, Armanda M
Sent: Wednesday, October 28, 2009 5:02 AM
To: DeJulius, Robert W; Sweeney, Shelly A
Cc: Howrigan, Tanya L; Bolog, Marguerite M; Shuttle, Peter J; Perkins, Robert M
Subject: RE: Advance parolees

Bob,

I'm not aware of an increase in the scenario of the AOS applicant whose H-1B has expired. In this scenario if the position and beneficiary qualify for the H-1B, we would grant the classification and deny the EOS. This assumes the alien has H-1B time remaining or has AC21. This is addressed in our local H-1B guide in Chapter 10 attached.

(b)(6)

Armanda Bouchard| DHS| USCIS | Vermont Service Center | Senior Adjudications Officer [redacted] Armanda.Bouchard@dhs.gov

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From: DeJulius, Robert W
Sent: Tuesday, October 27, 2009 3:45 PM
To: Sweeney, Shelly A; Bouchard, Armanda M
Subject: Advance parolees

Shelly and Armanda,

CSC is seeing an increase in I-129 petitions seeking to readmit advance parolees in the U.S. back into H1 or L1 status. Only H and L benes (and I believe V and K) that have a pending adjustment of status can be readmitted on an I-129. They usually are working under an EAD. We are seeing an increase of filings for advance parolees who were former H1B benes. Many of the beneficiaries of these petitions have had their previous I-797 H1B expire and some have also had their advance parole I-94 expire. We know that CBP still admits these aliens back into the U.S., depending on their situation, even if their H1b status has expired and their advance parole stay has expired. We are now starting to see an increase in these. I am aware of no policy for adjudicating these. Because these benes are not currently in non-immigrant status, and as advance parolees, are just seeking admission as an H1B, there are no procedures we have to follow.

Armanda, has VSC seen a rise in these filings and if so how are you handling them? When we get to the appropriate place in the SOP I believe we need to address this. Any advisement would be appreciated. Thanks

Robert W. DeJulius| Senior Immigration Officer | Division 2| USCIS | DHS |

(b)(6)

Laguna Niguel, CA 92677 | ☎ [redacted] 🖷: 949-389-8601 | ✉: robert.deJulius@dhs.gov

Nguyen, Dang H

From: Adams, Shawn M
Sent: Tuesday, June 30, 2009 9:32 AM
To: Chung, Jae M; Nguyen, Dang H; Kurniadi, Sanlyati; Hong, Yen; Reid, Brett M; Makabali, Michelle L; Delfosse, Ryan J
Subject: FW: Infosys

Please note...

Shawn Adams

From: Gooselaw, Kurt G
Sent: Tuesday, June 30, 2009 9:31 AM
To: Torres, Lory C; Steele, Jenny B; Adams, Shawn M; Dyson, Howard E; Harton, Frank A; Nicholson, Roya Z; Wolcott, Rachel A
Subject: RE: Infosys

Thanks. SCOPS was advised of this and if they do push back HQ will respond. But for now, we will be giving 1 year. Unless the end client is specific on the time requested or a contract is provided, 1 year will be the default.

From: Torres, Lory C
Sent: Tuesday, June 30, 2009 9:24 AM
To: Steele, Jenny B; Adams, Shawn M; Dyson, Howard E; Gooselaw, Kurt G; Harton, Frank A; Nicholson, Roya Z; Wolcott, Rachel A
Subject: RE: Infosys

In a supervisory meeting a couple of weeks back, this issue was brought up and we were advised to go ahead and give a two year period for those that asked for 1-2 years. I had advised my team to do so. Just letting you know we might see some push back from Infosys, who seems to be the biggest culprit, when they begin to receive 1 year instead of 2 or three.

From: Steele, Jenny B
Sent: Tuesday, June 30, 2009 7:17 AM
To: Adams, Shawn M; Dyson, Howard E; Gooselaw, Kurt G; Harton, Frank A; Nicholson, Roya Z; Torres, Lory C; Wolcott, Rachel A
Subject: Infosys

Please share the following with your officers.

The recent Infosys H-1B filings include letters from the end-user client. Many of these letters appear to be fine, with the exception of the validity dates given. The validity dates given are so general and are often given in range format, e.g., "We anticipate the need for the services of 15 Infosys personnel for a 2-3 year period commencing from the date they arrive in the US in H-1B status." For cases with such end-user client letters (range given for validity dates), we will be giving 1 year.

Jenny Steele| Supervisory Immigration Service Officer | Division 2| USCIS | DHS |

Laguna Niguel, CA 92677 | [redacted]: 949-389-8601 | ✉: jenny.steele@dhs.gov

(b)(6)

relating to Sensitive But Unclassified (SBU) information and is not to be released to the public or other personnel who do not have a valid "need-to-know" without prior approval from the originator.

Nguyen, Dang H

From: Gooselaw, Kurt G
Sent: Thursday, May 28, 2009 9:57 AM
To: #CSC Division II
Subject: H1B

Importance: High

In determining eligibility for the H-1B category, it is necessary, at times, to request for submission of contracts to establish that the services the beneficiary is to perform are in a specialty occupation. Regulations at 8 C.F.R. 214.2(h)(4)(iv)(A)(1) supports such requirement. The request for contracts is essential for cases where the beneficiary will be working off-site for a third party.

Here are the criteria for which to request such documentation:

- Cases where the petitioner falls under the 10/25/10 guidelines (gross annual income of <$10 million; employ 25 employees or less; and business was established within the last 10 years).
- Cases where the petitioner is an H-1B Dependent
- *Cases where the petitioner has an inordinate amount of filings compared to the number of employees listed on the petition*
- *Cases where the petitioner is on the active FID list*

Validity Period – once it has been established that there is a job immediately available for the beneficiary and the proffered position is that of a specialty occupation, the petition should be approved for the period specified on the contract or one year, which ever is longer.

Continuation Without Change cases - please request for W-2s and the beneficiary's income tax documents to establish that the petitioner did indeed pay the wages indicated on the previous H-1B petition.

As a reminder, it is imperative to request only the documents needed to determine eligibility. When requesting additional evidence, the RFE should be tailored to the instant case. The attached RFE includes documentary evidence that normally satisfactorily establishes that a specialty occupation exists for the beneficiary.

If further systems checks or a site check is needed, please refer the case to CFDO.

Please see your/a supervisor if you have questions.

Thanks.

Nguyen, Dang H

From: Adams, Shawn M
Sent: Tuesday, May 19, 2009 4:03 PM
To: Chung, Jae M; Nguyen, Dang H; Kurniadi, Sanlyati; Hong, Yen; Reid, Brett M; Makabali, Michelle L; Steele, Jenny B; Delfosse, Ryan J
Subject: Tuesday Meeting Notes

Reminders and news from the meeting today:

- Limit validity dates to contract dates. This includes medical residents. If for some reason a hospital contracts a medical resident for 18 months, then only approve for the 18 months. If the contract dates are not less than 3 years, then give the full 3 years.
- We will have 20 hours OT for PP 11.
- Post 1/18/09 H2 petitions must have matching dates. The dates on the LCA and petition must be the same.
- Don't forget we have pizza for lunch tomorrow! I ordered two pizzas, a veggie and a pepperoni. I'm looking forward to sharing pizza with you tomorrow! ☺

Thank you Team 3 for being so great!!

~Shawn

Nguyen, Dang H

From: Gooselaw, Kurt G
Sent: Wednesday, April 29, 2009 3:06 PM
To: #CSC Division II
Cc: Nguyen, Carolyn Q
Subject: H-1B Validity Periods
Attachments: Validity Date Cheat Sheet.doc

All,

It has been brought to my attention that we are experiencing a higher than normal error rate on validity periods associated with H-1B filings. Below are some helpful tips in order to facilitate adjudication and to reduce the number of errors. In addition, the validity date chart located in o:common is attached for your reference. I appreciate all the hard work you are doing in the Division, but sometimes we need to step back and ensure that our decisions are correct. So I am asking that you read the information below and in the attachment and become familiar with the requirements on validity periods. The scenarios below are not all the situations that may be encountered but should assist you with a majority of your workload.

Thank you,
Kurt

H-1B Validity Date Tips

As a reminder Validity dates may not be granted for time outside of the period authorized by the Department of Labor on the Labor Condition Application (LCA).

Validity dates may not be given for more than a 3 year period at one time.

A Change of Status, requested for a beneficiary currently on OPT where the petitioner requests a start date that is in the future (ie OPT ends 8/2/09, employment start date is 8/3/09, LCA start date 8/3/09) could be approved today with a validity start date that would not place the beneficiary out of status. In this case the start date is 8/3/09.

All requests for Change of Status, where the start date has past, receive date of adjudication An example would be today is 9/1/09, petitioner and LCA have a start date of 8/10/09 you would approve with a start date of 9/1/09.

An Extension of Stay, filed by a new employer, receives date of adjudication. The portability provision in AC21 allows for the beneficiary to work for the new employer while the I-129 is pending.

An Extension of Stay, filed by the same employer, receives the date following their current expiration date as long as it was timely filed. If untimely filed and claiming circumstances beyond their control discretion may be applied, however, you should consult with your supervisor.

Nunc pro tunc (approve now for then) is prohibited. Petitioners and/or attorneys will request nunc pro tunc, however, this is not done.

Cap Gap only applies to Change of Status petitions filed for a beneficiary currently in F-1 status.

When considering validity dates first you must determine whether the case is cap exempt or subject to the cap.

Jowett, Haley L

From: Fierro, Joseph
Sent: Monday, February 14, 2011 12:59 PM
To: Ecle, Lynette C; Devera, Jennie F; Chong, Jenny; Elias, Erik Z; Avetyan, Kurt H; Brokx, John B; DeJulius, Robert W; Helfer, Wayne D; Phan, Lethuy; Mikhelson, Jack; Cameron, Felicia M
Cc: Arganoza-Franciliso, Carmen U
Subject: FW: AILA Questions

FYI only.

From: Fierro, Joseph
Sent: Monday, February 14, 2011 10:52 AM
To: Sweeney, Shelly A
Cc: Harton, Frank A; Harvey, Mark E; VSC, Division 4 Senior; Chadwick, Donna; Janson, Nancy D; Lockerby, Beth A; Montgomery, Laura; Rhodes-Gibney, Cathy S; Shuttle, Peter J; Sweeney, Mark M; Canney, Keith J
Subject: AILA Questions

Shelly:

CSC also interprets the term "working off site" to mean that the beneficiary will be working at a location other than the petitioner's.

CSC also applies the referenced regulations and memos that VSC refers to.

In addition, CSC also refers to the January 08, 2010 Neufeld memo, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements,* page 10 which states:

> D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)
>
> Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2 (h)(2)(i)(B), the petitioner must submit a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being benched without pay between assignments.

Also, CSC refers to page 8 of the January 08, 2010 Neufeld memo which includes "a complete itinerary" as one of the types of evidence a petitioner can submit to demonstrate an employer-employee relationship.

Thanks,

Joe

From: Canney, Keith J
Sent: Friday, February 11, 2011 11:26 AM
To: Fierro, Joseph; Sweeney, Shelly A

Cc: Harton, Frank A; Harvey, Mark E; VSC, Division 4 Senior; Chadwick, Donna; Janson, Nancy D; Lockerby, Beth A; Montgomery, Laura; Rhodes-Gibney, Cathy S; Shuttle, Peter J; Sweeney, Mark M
Subject: FW: AILA Questions

Shelley –

Tanya has summarized VSC's approach to the issues you have raised.

Keith

From: Howrigan, Tanya L **On Behalf Of** VSC, Division 4 Senior
Sent: Friday, February 11, 2011 2:18 PM
To: Canney, Keith J; VSC, Division 4 Senior
Subject: RE: AILA Questions

Keith –

VSC interprets the term "working off-site" to mean the beneficiary will be working at a location other than the petitioner's. Officers refer to the following in determining if the beneficiary will work off-site:

- I129 Form, Part 5, Question 3 – this section has a place to indicate the address where the beneficiary will work if other than the petitioner's location;
- I129 Form, Part 5, Question 5 – this section asks the petitioner to answer yes or no to the question "Will the beneficiary work off-site?"
- The LCA – Page 3, Part G.a – Place of Employment;
- The LCA – Page 6 (if submitted) – the addendum for listing additional work locations;
- The petitioner's cover letter; and
- Any additional supporting documents, such as contracts or a formal itinerary, which suggests the beneficiary will be employed off-site.

In regards to the itinerary, officers refer to the regulations at 8 CFR 214.2(h)(2)(i)(B) which states:

> (B) Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

Officers also refer to the Michael Aytes Memo dated December 29, 1995 *Interpretation of the Terms "Itinerary" found in 8 CFR 214.2(h)(2)(i)(B) as it relates to the H-1B Nonimmigrant Classification.* If it appears the beneficiary will be working off-site, officers will look at the areas listed above to determine the itinerary of services or engagements. (b)(6)

Tanya L. Howrigan|Senior Adjudications Officer (ISO 3)| Vermont Service Center |USCIS | ☎: [redacted] |🖷 **802.527.4843|✉: tanya.howrigan@dhs.gov**

From: Sweeney, Shelly A
Sent: Friday, February 11, 2011 9:32 AM
To: Canney, Keith J; Fierro, Joseph
Cc: Harton, Frank A; Harvey, Mark E
Subject: AILA Questions

Keith and Joe,

AILA has asked how the centers are interpreting the term "working off-site" on the Form I-129 (Question 5, Part 5 on Page 4). Are the centers interpreting an affirmative response to this question to mean that the beneficiary will be working at an end-client location if there is no additional explanation in the file regarding the affirmative response? I believe so, but wanted to check with each of you. They also wanted to know what policy guidance memos each center is following regarding itinerary requirements when the petition indicates that the beneficiary will be performing work in more than one location. Specifically, which memos does each center follow as guidance when determining whether the petition has met the itinerary requirements?

We'd like to get responses by noon EST on Tuesday. I will be on travel to TSC next week, so could you copy Frank and Mark when you respond?

Thanks!

Shelly

Shelly Sweeney
Adjudications Officer
Business Employment Services Team
Service Center Operations
20 Massachusetts Ave N.W., Ste 2000
Washington D.C. 20529-2060

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Friday, March 05, 2010 3:25 PM
To: Steele, Jenny B
Subject: FW: AILA H-1B Questions
Attachments: 031710 QA.doc

For review and comment back to Shelly.

From: Sweeney, Shelly A
Sent: Friday, March 05, 2010 11:26 AM
To: Gooselaw, Kurt G; Nguyen, Carolyn Q; Perkins, Robert M
Cc: Johnson, Bobbie L; Young, Claudia F
Subject: AILA H-1B Questions

Kurt, Carolyn and Rob,

SCOPS has a meeting with AILA scheduled for the 17th. AILA has submitted a few questions/issues on H-1Bs. I have drafted responses to two and had a question for you all on the third. Can you let me know if you have any issues with the two draft responses and let me know what you think on the third by COB on Tuesday, March 9?

Thanks!

Shelly

Shelly Sweeney
Adjudications Officer
Business Employment Services Team
Service Center Operations
20 Massachusetts Ave N.W., Ste 2000
Washington D.C. 20529-2060

1. **New period of H-1B stay after residing outside of the US for 1 year [8 CFR §214.2(h)(13)(i)(B)]**

AILA respectfully requests that SCOPS confirm that per 8 CFR §214.2(h)(13)(i)(B), brief trips to the United States for business or pleasure during the required time abroad are not interruptive although they do not count towards the fulfillment of the required time abroad to refresh a new period of H-1B status after reaching the maximum limit. Please also confirm that the clock is not reset in counting the one year abroad from the time of the last brief trip to the United States but instead it is the aggregate amount of time spent outside of the United States prior to reapplying for a new full period of H-1B stay.

Response: 8 CFR §214.2(h)(13)(i)(B) does state that brief trips to the United States for business or pleasure are not interruptive, but do not count towards fulfillment of the required time abroad. The clock does not "reset" in those cases. That being said, please note that stays in the United States that are not brief trips for business or pleasure can interrupt the fulfillment of the required time abroad. The clock may "reset" in these cases.

2. **Credentials Evaluation for Education and Work Experience Combined**

A. AILA requests clarification of what the Service requires for credential evaluations that combine education and work experience. The regulations at 8 CFR § 214.2(h)(4)(iii)(D) describe what evidence may be submitted to demonstrate equivalence. The regulation at 8 CFR § 214.2(h)(4)(iii)(D)(1) states that combined education/experience evaluations must come from "an official who has authority to grant college level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training or work experience." Members report denials where the evaluation in support of an 8 CFR § 214.2(h)(4)(iii)(D)(1) determination is presented on the university's letterhead, but, the evaluations do not state that they were "done on behalf" of the university. Please remind adjudicators that there is no requirement that the evaluation have been "done on behalf of the university."

Response: While the determination on an evaluation does not necessarily need to be on behalf of a university, the record must establish that the individual providing the evaluation qualifies and has the authority "to grant college level credit." A letter an individual on university letterhead may not be sufficient to establish that the individual has the appropriate authority to issue the evaluation.

Comment [sas1]: Without seeing the full context of what AILA is claiming, this is as detailed as I can get. VSC and CSC, do you have any additional information or changes that need to be made to this response?

B. Under 8 CFR § 214.2(h)(4)(iii)(D)(5), education and experience can be considered the equivalent of a corresponding degree, *inter alia*, if the alien's expertise in the specialty occupation has been recognized by "at least two recognized authorities in the specialty occupation." A "recognized authority" is

defined in 8 CFR § 214.2(h)(4)(ii) as someone with expertise, special skills or knowledge in a particular field qualifying the person to render the opinion, and the opinion itself must be supported by the writer's qualifications, the writer's experience in giving opinions supported by specific examples, and the methodology and basis for reaching the conclusion. In relation to the proof required under 8 CFR § 214.2(h)(4)(iii)(D)(5), examiners appear to be rejecting "recognized authority" letters written by academics under 8 CFR § 214.2(h)(4)(iii)(D)(5) if these "authorities" are writing the letters at the request and pursuant to payment from credentials evaluation services, as opposed to on behalf of their educational institutions. Again – it does not appear that 8 CFR § 214.2(h)(4)(iii)(D)(5) prohibits anyone seeking to qualify as a "recognized authority" from providing the opinion letter via an evaluation service or other third party, so long as it is clear that it is the opinion of the authority and not the opinion of the third party, and so long as the opinion and its writer meet the other requirements of 8 CFR § 214.2(h)(4)(iii)(D)(5). Please remind examiners that evidence from a "recognized authority" may include opinion evidence found contained in reports from credentials evaluation services.

Comment [sas2]: VSC and CSC, quick question to make sure I understand the situation... is the issue that the authorities in question are not in the same specialty occupation (ie. they are performing services as credential evaluators rather than in the same specialty occupation as the beneficiary)? Or am I missing the nuance? I just want to reach out to you before SCOPS responds.

Jowett, Haley L

From: Perkins, Robert M
Sent: Tuesday, March 24, 2009 3:15 PM
To: Gooselaw, Kurt G; Nguyen, Carolyn Q
Cc: Boudreau, Lynn A
Subject: FW: Educational Evaluations
Attachments: RFE 2145 & 2146.doc

Kurt and Carolyn,

See Mack's response below regarding educational evaluations....

Rob

From: Bolog, Marguerite M
Sent: Tuesday, March 24, 2009 4:00 PM
To: Perkins, Robert M
Cc:
Subject: Educational Evaluations

Rob—

We are on the same page with CSC in that educational evaluations are acceptable only when considering foreign education equivalencies pursuant to 8 CFR § 214.2(h)(4)(iii)(D). When considering both work experience and foreign education, we request an evaluation from someone who has the authority to grant college level credit at a U.S. college that has a degree program for granting such credit. See autotext 2145 and 2146.

Also, below is an AAO decision posted on VSC's Intranet that is shared in the H1B Denial training, which dismisses an appeal and states that the evaluator has not submitted sufficient evidence to demonstrate he has the authority to grant college-level credit at a U.S. college with a degree program:

http://vsc.uscis.dhs.gov/Adjudications/Allied%203/H1B_AAO_Decisions/Systems%20Analyst%20No%20Eval%20from%20College%20Official.pdf

(b)(6)

--Mack

Marguerite (Mack) Bolog| DHS| USCIS| VSC | Immigration Services Officer 3| [redacted] **802.527.4843 |** marguerite.bolog@dhs.gov

RFE 2145

It appears that the beneficiary may be qualified to perform services in a specialty occupation through a combination of education, specialized training, and/or work experience in areas related to the specialty. Please submit an evaluation from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

RFE 2146

United States Citizenship and Immigration Services (USCIS) may determine that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. The following must be clearly demonstrated:

1) The beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty;

2) The claimed experience was gained while working with peers, supervisors, and/or subordinates who have a degree or equivalent in the specialty; and

3) The beneficiary has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

A) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

B) Membership in a recognized foreign or United States association or society in the specialty occupation;

C)Published material by or about the alien in professional publications, trade journals, or major newspapers;

D) Licensure or registration to practice the specialty occupation in a foreign country; or Achievements that a recognized authority has determined to be significant contributions to the field of the specialty occupation.

E) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Jowett, Haley L

From: Trinh, Nhut M
Sent: Thursday, March 05, 2015 4:18 PM
To: Chong, Jenny
Subject: FW: Foreign evaluation and duplicate evidence
Attachments: 1993-05-19, HQMemo, Miller--H, L, R Foreign Academic Equivalents.dot

Hi Jenny,
I can only find one e-mail regarding the foreign evaluation. Nothing about specialty occupation.
Thanks,
Nhut

From: Ecle, Lynette C
Sent: Tuesday, November 02, 2010 9:37 AM
To: Brandino, Keith M; Dao, John V; Farrell, Fernanda; Francis, Mariebelle G; Knapp, Julia A; Trinh, Nhut; Verma, Monica K; Westra, Michelle M
Subject: Foreign evaluation and duplicate evidence

Hi,

Please use good judgment when you are requesting more evidence. We're getting inquiries as to why we are requesting foreign evaluations. The issue of whether a foreign evaluation is required to be submitted with the filing of the I-129 is being verified with HQ. However, in the meantime, I'm attaching an older memo from 1993 which I ask that you read. If you have a case where the only issue being raised is the need for a foreign evaluation for a foreign Master's/Doctorate degree, prior to the RFE please send those cases to me so I can review it.

Also, if there is a duplicate copy of the I-129 in your filing (regardless of whether they are asking for consular processing), please make sure that you remove the duplicate copy of the I-129 and the accompanying duplicate evidence so that it can be sent to KCC. This holds true with duplicate evidence that is submitted in response to our RFE. As an example, we received an AmCon return where the Consulate indicated there was no evidence of contracts, etc. If the duplicate evidence that was provided by the petitioner was forwarded to the KCC, it's likely we would not have gotten the case returned to us. Basically, if the petitioner requests that the duplicate is forwarded to KCC/PIMS and provides the duplicate documents, then let's forward it.

Stop by if you would like to discuss this further. Thanks.

U.S. Department of Justice
Immigration and Naturalization Service

CO 214h-C, CO 214L-C
CO 214R-C, CO 1803-C

425 I Street NW
Washington, DC 20536

May 19, 1993

MEMORANDUM FOR All District Directors
All Service Center Directors
Director, Services Center Operations

THROUGH: James A. Puleo
Acting Executive Associate Commissioner for Operations

FROM: Office of Adjudications

SUBJECT: Determining Educational Equivalencies in Petitions Involving Specialty Occupations

Section 214(i)(1)(B) of the INA states, among other things, that a specialty occupation requires the attainment of a bachelor's degree or higher in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Service officers involved in the adjudication of H-1B petitions for aliens employed in specialty occupations are reminded that all petitions involving an alien who holds a foreign degree need not be accompanied by an evaluation performed by a credentials evaluation service. The regulation at 8 CFR 214.2(h)(4)(iii)(C)(2) merely requires that the beneficiary hold a foreign degree determined to be equivalent to a United States baccalaureate degree.

The determination that a foreign degree is equivalent to a United States degree can be made by a Service officer at the time the petition is adjudicated utilizing a number of factors other than an evaluation performed by a credentials evaluation service. For example, such factors as the alien's prior work experience, the past hiring practices of the petitioning entity, the reputation of the petitioning entity, and an examination of the official transcript of the alien's academic courses should be taken into consideration by the officer in determining whether the alien's foreign degree is equivalent to a United States degree. Obviously, in those situations

where the adjudicator is unable to render a decision in this area, an evaluation from a credentials evaluation service should be requested.

Once a determination has been made that a specific foreign degree is equivalent to a United States degree, that determination may be utilized in the adjudication of future petitions, provided of course, the factors in both petitions are substantially the same.

The instructions in this memorandum may also be utilized in the adjudication of employment-based petitions; L-1 specialized knowledge professional cases, and R-1 religious workers.

R Michael Miller
Acting Assistant Commissioner

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Wednesday, July 22, 2009 11:20 AM
To: Nguyen, Carolyn Q
Cc: Gregg, Bret S
Subject: FW: H-1B Consultants and Staffing

Carolyn,
Given the confusion surrounding the contract issues and the email from SCOPS, we are currently adjudicating H1Bs in the following manner. Please let me know if you have any issues with this so we can be consistent.

From: Steele, Jenny B
Sent: Wednesday, July 22, 2009 8:34 AM
To: Adams, Shawn M; Dyson, Howard E; Gooselaw, Kurt G; Harton, Frank A; Nicholson, Roya Z; Torres, Lory C; Wolcott, Rachel A
Subject: H-1B Consultants and Staffing

Per our discussion yesterday regarding H-1B consultants and staffing companies, we will accept an employer support letter in lieu of a contract, SOW, or letter from the end-user client, as long as the employer support letter states the dates of employment, contains a detailed job description, and lists the job location. Please note that this email does not apply to the following petitioners: 10-15-10, FID, those with an inordinate number of filings, or H-1B dependent. Any petitioners on the FID, 10-25-10, having an inordinate amount of filings or H-1B dependent needs to provide a contract SOW, or letter from the end-user client. Any evidence provided by such petitioners will receive one year or the validity that is listed on the evidence, whichever is longer. Any evidence giving a range for the validity, i.e., 2-3 years, will receive one year.

(b)(6)

Jenny Steele| Supervisory Immigration Service Officer | Division 2| USCIS | DHS |

Laguna Niguel, CA 92677 | ☎: [redacted] 🖷: 949-389-8601 | ✉: jenny.steele@dhs.gov

Jowett, Haley L

From: Nguyen, Carolyn Q
Sent: Thursday, April 30, 2009 2:30 PM
To: Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Henson, John C
Subject: FW: H-1B Validity Periods
Attachments: Validity Date Cheat Sheet.doc

Follow Up Flag: Follow up
Flag Status: Flagged

FYI –

The 8 CFR also addresses validity of petitions under each specific classifications that I find are useful.

From: Gooselaw, Kurt G
Sent: Wednesday, April 29, 2009 3:06 PM
To: #CSC Division II
Cc: Nguyen, Carolyn Q
Subject: H-1B Validity Periods

All,

It has been brought to my attention that we are experiencing a higher than normal error rate on validity periods associated with H-1B filings. Below are some helpful tips in order to facilitate adjudication and to reduce the number of errors. In addition, the validity date chart located in o:common is attached for your reference. I appreciate all the hard work you are doing in the Division, but sometimes we need to step back and ensure that our decisions are correct. So I am asking that you read the information below and in the attachment and become familiar with the requirements on validity periods. The scenarios below are not all the situations that may be encountered but should assist you with a majority of your workload.

Thank you,
Kurt

H-1B Validity Date Tips

As a reminder Validity dates may not be granted for time outside of the period authorized by the Department of Labor on the Labor Condition Application (LCA).

Validity dates may not be given for more than a 3 year period at one time.

A Change of Status, requested for a beneficiary currently on OPT where the petitioner requests a start date that is in the future (ie OPT ends 8/2/09, employment start date is 8/3/09, LCA start date 8/3/09) could be approved today with a validity start date that would not place the beneficiary out of status. In this case the start date is 8/3/09.

All requests for Change of Status, where the start date has past, receive date of adjudication An example would be today is 9/1/09, petitioner and LCA have a start date of 8/10/09 you would approve with a start date of 9/1/09.

An Extension of Stay, filed by a new employer, receives date of adjudication. The portability provision in AC21 allows for the beneficiary to work for the new employer while the I-129 is pending.

An Extension of Stay, filed by the same employer, receives the date following their current expiration date as long as it was timely filed. If untimely filed and claiming circumstances beyond their control discretion may be applied, however, you should consult with your supervisor.

Nunc pro tunc (approve now for then) is prohibited. Petitioners and/or attorneys will request nunc pro tunc, however, this is not done.

Cap Gap only applies to Change of Status petitions filed for a beneficiary currently in F-1 status.

When considering validity dates first you must determine whether the case is cap exempt or subject to the cap.

EOS – SAME EMPLOYER

Make note of:
- Date current H-1B status expires
- Dates listed on LCA
- Dates requested by Petitioner

Questions to ask:
- Is the beneficiary in status? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **reclaimed time?** If so see *Note 3*

Validity date will **begin** one day after the current H-1B status expires and will be valid for at most three years or until the beneficiary has reached the six year limit; unless, the petitioner requests less time and/or the LCA's validity dates restrain the adjudicator from granting three years or up to the six year limit.

EOS – DIFFERENT EMPLOYER

Make note of:
- Date current H-1B status expires
- Dates listed on LCA
- Dates requested by Petitioner

Questions to ask:
- Is the beneficiary in status? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **reclaimed time?** If so see *Note 3*

Validity date will **begin** no earlier than the date of adjudication or will be valid at a date later than the date of adjudication if 1) the petitioner requests a later start date, or 2) the LCA is valid at a later start date, and will be valid for at most three years or until 1) the beneficiary has reached the six year limit, and/or 2) the petitioner requests less than a three year extension, and/or 3) the LCA is valid less than a full three year extension.

CHANGE OF STATUS

Make note of:
- Beneficiary's current status
- Date current status expires
- Dates listed on LCA
- Dates requested by Petitioner

Questions to ask:
- Is the beneficiary currently in valid status and/or will the beneficiary be in valid status when the COS is to begin? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **reclaimed time?** If so see *Note 3*

Validity dates will **begin** no earlier than the date of adjudication or will be valid at a date later than the date of adjudication if 1) the petitioner requests a later start date, or 2) the LCA is valid at a later start date, and will be valid for at most three years or until 1) the beneficiary has reached the six year limit, and/or 2) the petitioner requests less than a three year extension, and/or 3) the LCA is valid less than a full three year extension.

Note 1: Beneficiary out of Status
If otherwise approvable, but the beneficiary's status expires before the extension or change of status is requested to or legally can begin (e.g. due to H-1B cap), the officer must issue a split decision, denying the extension or change of status while approving the nonimmigrant classification.

Note 2:Extension Beyond 6-Year Limit
Four circumstances exist which enable validity dates to range beyond the six year H-1B limit:
1) AC-21 issues (see below)
2) Itinerant/seasonal work*
3) Border crossers/border commuters*
4) Reclaiming time (see note 3)

* itinerant/seasonal work and border crossers/commuters are relatively rare and will not be discussed here. See your supervisor and/or coach for more information.

AC-21 questions:
- *Is there evidence of a labor certification or immigrant petition that has been pending over 365 days?* If so, the adjudication can extend beyond the sixth year in one year increments.
- *Is there evidence of an approved I-140, but the visa is not available?* If so, the adjudicator can approve beyond the 6th year for up to three years.

Note 3: Reclaimed time
Days spent outside the United States during the validity period will not be counted toward the maximum period of stay; the petitioner must submit independent evidence documenting any and all periods of time spent outside the United States. *See Matter of IT Ascent and Aytes memo dated 10/21/2005.*

Jowett, Haley L

From: Nguyen, Carolyn Q
Sent: Friday, April 24, 2009 12:50 PM
To: Gooselaw, Kurt G
Subject: FW: Licensure

We are giving the full period.

From: Faulkner, Elliott C
Sent: Friday, April 24, 2009 10:39 AM
To: Nguyen, Carolyn Q; Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Harvey, Mark E; Henson, John C
Subject: RE: Licensure

yes

From: Nguyen, Carolyn Q
Sent: Friday, April 24, 2009 10:38 AM
To: Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Henson, John C
Subject: FW: Licensure
Importance: High

I think for positions where they can work under a supervisor's license, we are giving a full 3 years, right? Too lazy to look through my archives. ☺

From: Gooselaw, Kurt G
Sent: Friday, April 24, 2009 9:42 AM
To: Nguyen, Carolyn Q
Subject: Licensure
Importance: High

Carolyn,
Where a bene does need a license such as some resident physicians, what is the current practice in Div I regarding validity periods? I have received some inquires that indicate we are giving only 1 year where someone is authorized to work under a superior's license. I re-read the regs on this and it appears we should be giving the full period as long as they are qualified. Please let me know as I would like to send a message out to my Division to clarify this.

Thanks

Jowett, Haley L

From: Nguyen, Carolyn Q
Sent: Thursday, May 13, 2010 3:29 PM
To: Trinh, Nhut; Phan, Lethuy; Helfer, Wayne D; Brokx, John B; Avetyan, Kurt H; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Harvey, Mark E; Mikhelson, Jack; Moran, Karla
Subject: FW: Meeting 4/22

Hi,

The below was issued by Kurt subsequent to our meetings with Counsel. Please note that we will be working with SCOPS on bullet 2 on adopting the Kazarian decision for our O decisions.

Please let me know if you have questions. Thanks.

From: Gooselaw, Kurt G
Sent: Tuesday, April 27, 2010 8:54 AM
To: #CSC Division II
Cc: Nguyen, Carolyn Q; Dela Cruz, Charity R; Dyson, Howard E; Onuk, Semra K; Steele, Jenny B; Torres, Lory C; Wolcott, Rachel A
Subject: Meeting 4/22

In response to last Thursday's meeting this is being issued for clarification. This is solely guidance and not a policy memorandum and this is not to be quoted or used in RFEs or distributed to the public. Here are some bullets for your reference to assist with O and H1B adjudication. Should you have questions, please discuss with you supervisors.

Thanks

- O-1 Itineraries – As discussed yesterday events and a series of events can be considered one event. There is no day gap threshold in determining whether two or more related events constitute one event for the validity period. You must evaluate, given the facts, whether a gap in time is reasonable and all events or series of events are related in order to be considered one event. This is a case-by-case determination given the totality of the evidence. For example – should a beneficiary be scheduled to perform at more than two venues look to the purpose and scope of the performance and verbiage describing what the beneficiary will be doing between performances in order to evaluate whether the two or more performances can be considered one event. There is no 45 day rule. We will evaluate these in a way that is beneficial to the petitioner and use a reasonable approach. However, should two performances be so far apart that it appears that each performance is one separate event, we will RFE first to allow the petitioner to describe what the beneficiary will be doing between these two or more performances before making a final decision.

- Sustained acclaim – Sustained acclaim is demonstrated by receiving a major internationally recognized award (O-1A). For O-1B arts the beneficiary must have received or been nominated for a significant national or international award or prizes. If not, the beneficiary may qualify by **adequately** meeting 3 of the 8/6 (O1A and O1B arts) regulatory prongs. The prongs are setup to weigh whether or not someone has demonstrated sustained acclaim and meet the O-1 threshold. There was a totality review adjudication discussion, however, we will continue to adjudicate and ensure that the evidence submitted meets that established level for the prongs in order to determine whether the beneficiary qualifies for O-1. Should the petitioner demonstrate the beneficiary **adequately** (more likely than not) meets the 3 of the 8/6 prongs, the case should be approved.

- O-1B Arts – The evidentiary standard is **prominence, well known or leading** in the field of arts. When evaluating evidence that falls within each prong, this standard needs to be applied. O-1B arts has the lowest standard of the three O-1 classification types.

- O-1B Motion Picture/TV – Receipt or nomination of a significant international/national award (including but not limited to Academy Award, an Emmy, a Grammy, or a Director's Guild Award) in this category is sufficient to establish the beneficiary qualifies for this O-1 classification type without additional evidence to show a demonstrated record of achievement. The evidentiary standard is **outstanding, notable or leading in the motion picture or television field**. If an award is not shown when evaluating evidence that falls within each prong this standard needs to be applied. O-1B motion picture/television has the second lowest standard of the three O-1 classification types.

- O-1 comparable evidence – Should evidence be submitted where it cannot be considered a significant award or evidence that does not readily fit into the prongs, such evidence should be considered and analyzed in accordance with the set standards. It should be noted that there is no provision in the regulations for comparable evidence in the motion picture and television category.

- One hit wonders – these are usually few and far between. However, if a beneficiary received a significant award 30 years ago and did not continue in their field of endeavor this may call into question whether the beneficiary actually meets the standard. This would need to be evaluated on a case-by-case basis.

- H-1B offsite employment initial filing (change of employer) – Should the petitioner have a well-established filing practice or track record with USCIS – unlike H-1B dependent employers, 10/25/10 employers, and CFDO returns with Statement of Findings – an employment support letter (written by the petitioner) and itinerary is sufficient as long as it shows the job description, right of control and validity period of the position. With this evidence it is more likely than not the petitioner has met its burden for the employer-employee relationship aspect and you **have the discretion** to accept this evidence as meeting the EE standard. All other issues such as maintenance of status, beneficiary qualifications, specialty occupation must also be evaluated independently on other evidence. Should the case be approvable in all respects and the itinerary states the validity period and matches what is requested on the petition and LCA, we should use that period of time period as the validity period.

- H-1B offsite employment (initial) continued – Should the employment letter fail to include the pertinent information discussed above and/or the petitioner does not have a well-established filing practice or track record, see above for examples, you would need to evaluate the evidence and identify the deficiencies. You should issue an RFE, but you would need to articulate what was received and what the deficiencies are. In this situation the RFE needs to include the evidence as bulleted in the template.

- Contracts – If a contract combined with the statement of work (SOW), addenda, end user client letter, service agreements, etc. is present the validity within those documents controls the end date. If it is shorter than one year, issue an RFE and provide the petitioner with an opportunity to submit evidence for the full period requested. If an RFE has already been issued for these documents, a second RFE is not needed. If less than one year is shown, then provide one year. If more than one year provide that time as long as the beneficiary is eligible. Should there be a range we would give the shorter period. If the shorter period is less than one year we would provide one year.

- EOS with the same employer – As long as the petitioner can establish that it continues to meet all the regulatory H-1B requirements the case should be approved. If the EOS does not indicate regulatory compliance an RFE is warranted and use the RFE template accordingly.

- EOS with a new petitioner – see above on initial filings.

- Self-petitioning H-1Bs and O-1s – Self-petitioning H-1Bs need to be brought to your supervisor with the intended decision – no clerical or C3 updates. O-1self-petitioners can be adjudicated but do not use H-1B language or the EE memo in your adjudication. The regulation for Os is clear that an O-1 beneficiary cannot self-petition and does not qualify as a US employer.

Jowett, Haley L

From: Faulkner, Elliott C
Sent: Thursday, January 08, 2009 9:07 AM
To: Chong, Jenny ; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Harvey, Mark E; Nguyen, Carolyn Q; Stock, Chrysta D; Torres, Ricardo (CSC)
Cc: Nguyen, Carolyn Q
Subject: FW: PT's and the OOH

FYI on the Physical Therapists. It makes sense to me. Let me know if you have any comments.

From: Gooselaw, Kurt G
Sent: Monday, December 22, 2008 8:14 AM
To: Faulkner, Elliott C
Subject: RE: PT's and the OOH

Elliott,
I understand the issue and I will be sending this up to HQ for a policy decision on new employment and change of status. However, my argument on this is that the requirements for a specialty occupation is that a baccalaureate degree or higher is required. In this case for PT and OT a masters degree is required in order to be deemed a specialty. Even though the beneficiary may have a license in PT, the position itself cannot be a specialty occupation if the petitioner requires less than a masters degree and in this case the normal minimum entry requirement is a masters. The citations below in your email indicate bene qualifications, not specialty requirements. For example, if the bene has a license in hazardous material trucking and a BS degree in chemical engineering, this would not qualify for a specialty occupation even though the bene has a license and a degree. The position does not qualify as specialty because a BS degree is not the minimum requirement therefore having a license is moot. However, if a dentist presented his full and unrestricted license, he would then qualify under the beneficiary requirements as it is accepted that the position of dentist is a specialty occupation because a degree in DDS or DMD is required, therefore he would not have to present the degrees in order to show qualification, just the license.

I hope this makes sense. Let me know if you have any further questions.

214.2(h)(4)(iii)
(A) Standards for specialty occupation position. To qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

214.2(h)(iii)(C) Bene Qualifications –

Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

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From: Faulkner, Elliott C
Sent: Saturday, December 20, 2008 3:13 PM
To: Gooselaw, Kurt G
Subject: PT's and the OOH

Kurt-

Since we are holding the COS/new employment H-1B Physical Therapists to the OOH's new standard of a Master's degree, how are we going to deny these cases? I assume we would deny them because the beneficiary is not qualified, but this is counter to what the regs say. Won't they will just turn around and say that they have a state license and thereby satisfy #3? Let me know what you think.

8 C.F.R. 214.2(h)(4) (iii)(C) further lists four criteria, one of which must be met, for a beneficiary to qualify to perform services in a specialty occupation. Essentially, the beneficiary must:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Jowett, Haley L

From: Agnelly, Mary C
Sent: Thursday, May 22, 2008 2:13 PM
To: Brickett Sr, Stephen M; Fierro, Joseph ; Goodman, Lubirda L; Gooselaw, Kurt G; Johnson, Ron E; Prince, Rose M
Subject: FW: Re: 16 Edition!!
Attachments: ROLLING FAQs 16th ed 052208.doc

Attached is the consolidated 16th Edition of the Rolling FAQ's. It will be updated to o:common at close of business today. Any changes or corrections please advise.

This is the last scheduled edition of the Rolling FAQ's.

From: Wang, Yamei
Sent: Thursday, May 22, 2008 10:40 AM
To: Agnelly, Mary C
Subject: Re: 16 Edition!!

Yamei Wang| Adjudication Officer | Division 3| USCIS | DHS |

Laguna Niguel, CA 92677 | ☎ [redacted] 🖷: 949-389-3490 | ✉: yamei.wang@dhs.gov

(b)(6)

ROLLING FAQ's.....Edition #15

Questions answered on H1B issues

EOS Questions

Grace Period

Q: Is there a grace period for filing after the authorized period of stay expires (as shown on the I-94)? (6th Ed. 4/19/2007) (9th Ed. 4/25/2007) *****Corrected*****

A: There is a 10-day period after the authorized stay expires on H1B nonimmigrants for the purpose of allowing the alien to depart – an extension can be filed during the 10-day grace period, but it is still considered an untimely filing. An untimely filing is one filed after the previous status has expired. The 10-day grace period does not change this. Also, remember that a petition filed the day after status expires is a timely filing: For example, if status expires on 4/24/07 and the extension is received on 4/25/07, this is considered a timely filing. If the extension is received on 4/26/07 or thereafter, it would be considered untimely.

Finally, a late filing can be excused at the discretion of the adjudicator if the late filing was beyond the control of the petitioner or beneficiary. Beyond the control does not mean that the petitioner or the representing attorney forgot to file timely. That is within the petitioner's control. Examples of beyond the petitioner/beneficiary control would be if a petitioner was in an accident while attempting to deliver the petition to the post office and was hospitalized for a period of time and then mailed the file when he was able and it was received late. Another may be an attorney assured the petitioner that the file would be filed timely, but the attorney filed it late and did not inform the petitioner, but attempted to deceive the petitioner that the file was timely. Normally, documented evidence needs to be presented by the petitioner to show the late filing was beyond the petitioner's control. Evidence could be medical reports or evidence that the petitioner has filed a complaint/law suit against the attorney who deceived the petitioner.

H time

Q: Does H1B1 (Singapore or Chile) time count toward the H1B time?

A: Yes, but the reverse is not true. Time as H1B does not count toward the 5-year extension limit on H1B1. See INA 214(g)(8)(D).

Filed during 10 days post expiration

Q: What should I do when the petition is filed during the 10 days after the current H1B expires? What is the start date going to be? (6th Ed. 4/19/2007) ***Amended*** (12th Ed. 3/31/2008)

A: The petitioner can file during the 10 day period after the expiration of the current H1B status granted to the alien to depart the U.S. The H1B is not authorized to work during this period. The officer will need to look at the LCA to determine the start date – grant the start date the LCA does. If the LCA indicates a start date immediately following the end date of the current status, then that start date can be granted; if it gives a start date, for example for the 10th day after the current status expires, then that is the date they will be given. If a split decision, the start date will be the date of adjudication or a future date.

Recaptured Time

Q: Can a petitioner request recaptured time for an AC21 year? Scenario: A petitioner was requesting recaptured time for year 8 when the beneficiary was in their 9th year. (1st ed. 4/12/2007)

A: No. Recaptured time is limited to the initial years. See *Matter of IT Ascent (AAO 2006, 06-001)* AC21 time cannot be adjusted or recaptured. A request for recaptured time is a request to adjust the 6 year period, taking into account time not spent in H1B status, so that is not a request for time beyond the 6 years, but a request to complete the entire 6 years, even if it appears to go into the 7th year.(2nd ed. 4/13/2007)

Q: When can an alien recapture time?

A: Recaptured time may be requested and granted at any stage, before or after AC 21 time, but time under AC 21 can **not** be recaptured. (14th ed.)

Q: Is a new LCA required for recaptured time?
A: The Labor Condition Application must cover the entire time period requested including any recapture time. (14th ed.)

Seasonal/intermittent employment/Commuters
Q: What action do I take? The beneficiary has held previous status as an H1B over the past 5 years. A review of SQ94 shows that the beneficiary was in the U.S. only for a few months at a time for the first three years of the five – in the last two years the beneficiary was in the U.S. in H1B status for most of each year. The petitioner is now asking for another three years. Do I look at recaptured time? How much time are they eligible for? (8nd ed. 4/23/2007)
A: Seasonal/Intermittent employment (less than 6 months out of the year) and commuters are not subject to the 6 year limit. Do not start counting the 6 years until/unless the beneficiary is here for more than 6 months out of the year. In the instant case, we would not count the first three years towards the 6 year limit, as that time is not subject. We would consider the two most recent years as subject to the 6 year limit, and would be able to grant, if otherwise approvable, three years.

AC21 eligibility –

Q: A petitioner filed I-129 seeking extension beyond 6 years limitation. For AC21 104(a), do they have to qualify as of date of filing or date of adjudication?
A: As of date of filing, the alien must have an approved I-140 and visa number not available.

Q: A I-129 petition was filed for a Chinese citizen seeking 104(a) extension for 3 years. The relating I-140 was approved for Employment 2nd Preference with a priority date March 11, 2006. Upon review the attached I-539, the officer found that the alien's spouse was born in Canada and their child is a Japanese citizen. Does it affect the request of extension for 3 years?
A: Yes, under alternate chargeability rules, the visa number may be charged to country of birth of the spouse. Even though a visa number may not available for China, it is available for Canada or Japan. Therefore, the EOS would be granted only for 1 year. See INA 202(b)(2).

Q: The labor certification application was approved on Jan 26, 2007 with no I-140 filing so far. What should I do with the extension?
A: Deny it under AC21 106(a) unless the I-129 was filed before Jan 12, 2008. See o:common for denial. All labor certifications approved before July 16, 2007 must now have an I-140 filed. The 180 day clock for these older approved labor certifications started on July 16, 2007 and the clock expired on January 12, 2008. Therefore, no extension will be granted without the filing of I-140 for these old labor certifications.

Q: If the I-140 used as the basis for eligibility under AC21 was denied and the petitioner filed an appeal with the AAO, can the petitioner use the I-140 to qualify for AC21? (2nd ed. 4/13/2007)
A: Yes - as long as the appeal is still pending, the I-40 is considered pending. If in checking the status of a Backlog Reduction Labor cert the officer finds that the certification has been denied, the officer must either RFE or ITD for verification of whether an appeal has been filed.

NOTE: Because of the 12/05 Aytes memo stating that an alien does not have to be in the U.S. or be in H1B status to file for AC21 benefits, an L beneficiary can get AC21 benefits when a petitioner files a COS to H1B for him. This is true even if the alien has had a mixture of H1B and L status OR if the alien has had all L status.

Examples:

1. An alien with first 3 years of H and then 3 years of L status can COS to H1B under AC21
2. An L1B alien who has used up all 5 years of L1B status can COS to H1B and get the 6th year of H1B and 2 years under AC21 if qualified to do so.
3. An L1A who has used up all 7 years of L1A status can COS to H1B under AC21.

Remember, the alien does not have to be currently in H1B status to get AC21 benefits, but must be in non-immigrants status. He cannot be out of status. An alien outside of the US who has prior H1b status is also eligible for extension under the 6 year rule (11th Ed. 5/18/2007)

Q: What if a second I-140 or I-485 has been filed? (11th Ed. 5/18/2007)
A: With rare exception, once and I-140/485 originally filed under the original labor cert. is denied, the labor cert. is dead in the water. AC21 makes it clear that GENERALLY, the labor cert can be used for AC21 benefits until a FINAL DECISION was made on the related petition/application. Once a decision is made on the I-140/485, the labor cert. is no longer valid for AC21. But please be mindful of appeals of denials that have been filed and are still pending. Also, keep in mind, if a second I-140 has been filed and is now pending for more than 365 days, it does qualify for AC21 benefits. This information will need to be verified.

Q: For FY 2009 cases, are DOL backlog reductions or local filing letters still valid?
A: Letters from local, state DOL offices or the Backlog Reduction Centers are no longer sufficient by themselves to establish that eligibility under AC 21 Section 106. DOL has announced on its website that the backlog reduction centers are closed and that all cases are completed as of Oct 1, 2007. Subsequently, DOL has admitted that there is handful of cases not completed but the number is less than 10. Thus, action on the labor certification request should have been completed. The officer now needs evidence of the most recent action by DOL. If the labor certification is not current and no appeal was filed, the alien is no longer eligible for AC 21 106 benefits. If the labor certificate was granted, then the petitioner has 180 days after approval or Jan 12, 2008, whichever is later, to file an I-140. Failure to file the I-140 timely automatically invalidates the labor certification and thus the alien is not longer eligible for benefits under AC 21 Section 106. (14th ed.)

Q: A letter from DOL indicated the ETA was closed due to late filing or incomplete. In response to my RFE, the petitioner submitted a Backlog printout of the ETA which has a TR in the processing Type. What does TR stand for? (11th ed. 5/18/2007)
A: TR identifies the case as a Traditional Recruitment case for the backlog reduction group at the Department of Labor.

Q: The beneficiary has a pending I-485 as a derivative. The beneficiary wants to remain in H-1B status and request a 3-year extension. Do I need to find out what category the beneficiary has filed for on the I-485 before granting one year or three years? (11th Ed. 5/18/2007)

A: Since the I-485 is based upon the alien's derivative status, not as the "beneficiary of a petition filed under 204(a)", the alien is not eligible in his or her own right for an H1B extension on the basis of SEC 104 of AC 21. To be eligible for 106, the beneficiary needs to have a labor certification and/or I-140 filed in his or her behalf. See the Dec 2005 memo. Thus, being a derivative does not establish eligibility under AC 21 as an H1b.

Q: The status on the Labor Cert shows Denial of RIR (Reduction in Recruitment)...does that mean the Labor Certification has been denied? (2nd ed. 4/13/2007)
A: No, this is not a final decision on the Labor Certification.

Q: When should the officer request an update on the pendancy on the Labor Certification? How old is too old? (2nd ed. 4/13/2007) ***amended*** (12th ed. 3/31/2008)
A: The Department of Labor has indicated that all Backlog Reduction cases have been completes, although they acknowledge that some may have fallen through the cracks. In all Backlog cases, if the DOL letter is more than 90 days old, we will require an updated letter from DOL.

Q: Is there another way I can check on the status of a labor cert (ETA-750/9089)? (5th ed. 4/18/2007)
A: The officer can by emailing H1B7YR@PHI.DFLC.US and giving the alien's name, DOB, name of entity that filed the petition and the approximate date of filing. They can reply to the officer just as they reply to the petitioner, with the Case #< employer name, received date, priority date, and whether the case is pending.

Ongoing employment –
Q: Is the beneficiary maintaining status? (2nd ed. 4/13/2007) Scenario: On a change of employer, the petitioner was requested to submit a copy of the beneficiary's last pay check with the prior employer... The petitioner responded by stating that the while the beneficiary worked for the previous employer, the previous employer had refused to pay the beneficiary, and so a last pay stub was not available. The current petitioner submitted evidence that the beneficiary had filed a complaint against the previous employer with the state's DOL (or equivalent).
A: In this case, it appears that there was an ongoing employee-employer relationship between the beneficiary and the prior employer, thus the alien was maintaining status.

Amended petition
Q: Can I back date to the date requested for amended petition where the date is the same as original petition but the new start date is now past?
A: It depends on the situation. Yes, you can back date it if the amended action is not material to the petition such as name changes, merger or acquisition of the petitioner. If the amended action is material to the decision such as job duties changes, then the earliest date you may give is the adjudication date. Amended petition can only be filed for the petition issues, not status issues. Any change related to I-94 should not be handled by amended petition but I-102. Problems related to split decisions may be resolved through a new petition, not amended petition. 8 CFR 214.2(h)(2)(i)(E).

Portability-Bridging
Q: The petition A was expired in Feb 2008. The petition B, the first extension was filed in Feb 2008. C company, a new employer, also filed the extension for the alien in March 2008. Which petitions should I adjudicate first?
A: Adjudicate petition B before C.

Q: The beneficiary was initially granted H1B status for Company A. He then changed employers to Company B, then to Company C. When I looked in CLAIMS, the I-129 for Company B was denied...What do I do? (2nd ed. 4/13/2007)
A: The officer needs to look further into the case to see whether the beneficiary can bridge under Section 105. See Archives section (d) below for an example and diagram that demonstrates how bridging works...

Concurrent Employment/Part Time Employment
Q: Does the petitioner need to list the hours that the beneficiary is going to work on part-time employment? The fact that they are part time is listed on the I-129 and on the LCA. (5th ed. 4/18/2007) ***Expanded*** (12th ed. 3/31/2008)
A: The LCA specifies that the range of hours for the beneficiary will be listed in detail on the I-129. If the petitioner does not indicate the range of hours on the I-129, then an RFE will need to be issued. Without the range of hours, the LCA is not valid. To adjudicate an EOS/COS, the number of hours is also needed to determine whether or not the alien will have sufficient resources not to become a public charge.

Q: For concurrent employment where there is both non-exempt and exempt employment (meaning exempt or non-exempt from the cap count), how is the cap counted? (13th ed. 4/17/2008)

A: As long as the alien continues to work for the exempt employer and the non-exempt employer continues to file as a concurrent employer, the alien is not required to be counted.

Q: Where the concurrent employment is both non-exempt from the cap and exempt from the cap do we limit the exempt employment to the period of the non-exempt employment? (13th ed. 4/17/2008)

A: No, per Headquarter (April 2008) we will no longer limit the employment period to match the exempt employment period.

Advanced Parolee
Q: When the beneficiary/applicant has been admitted last as an Advanced Parolee, what status does the advanced parole give the beneficiary? (5th ed. 4/18/2007) ***Amended*** (12th ed. 3/31/2008)
A: Aliens applying for status as H-1B / L-1 and their dependents who have been paroled into the U.S. (not as a humanitarian parole) and were prior H-1B or L-1 aliens may be admitted by the adjudicator (through granting the class) and their stay extended without requiring the alien to return to CBP to complete their inspection.

Q: In the split decision we prepare on the H-4 dependents that have been given advance parole, what denial template should I use? (8nd ed. 4/23/2007) ***amended*** (12th ed. 3/31/2008)
A: This is no longer a basis for denial – see prior question

I-94s
NOTE: The most recently issued I-94 is the controlling document. It indicates the dates in which the beneficiary is authorized to work for the petitioner. The I-797 is authorization for the petitioner to employ the beneficiary for the dates listed - for I-9 purposes. (5th ed. 4/18/2007)

Q: What action should I take? The petitioner has submitted an amended petition, indicating that the inspector made an error and granted the beneficiary less time then what was granted on the I-129 approval notice...They want an I-94 with the correct dates. (5th ed. 4/18/2007)
A: The inspector has the authority to and very well may grant less time than the I-797. This is not an error on the inspector's part. There was a reason, known not necessarily to us, why the inspector gave the beneficiary less that the time granted on the I-129 - whether it has to do with the passport of the beneficiary, certain agreements/limits put on certain countries, etc. As stated above, the most recently issued I-94 is the controlling document. There is no error to correct, either by the inspector or in CLAIMS. The I-129 needs to be filed for an extension of stay, not an amended petition.

I-485 Approved
Q: If the alien has an approved I-485 and adjusted status to an LPR...what do I do with the I-129? (7th Ed. 4/20/2007)
A: It depends on the circumstances. If the date of adjustment is prior to the authorized stay expiring, then deny the petition as the alien is no longer a nonimmigrant. If the date of adjustment is after the date of authorized stay expired, approve the petition to cover the gap between the expiration of stay and the date of adjustment. The employer needs this for I-9 purposes.

STATUS Questions

COS/EOS Requirements – H1B and other classifications
Q: What are the requirements regarding being in the U.S.? What about other classifications other that F1's? (e.g. L's etc.) What is KCC? What is the difference with KCC and sending it to the consulate of the beneficiary's country? (6th Ed. 4/19/2007)
A: The same principles apply for EOS as H-1B or COS to H-1B for all other classifications. The beneficiary must be here at the time of filing and, for COS, must remain here. For EOS, it depends if the beneficiary has time remaining on their previously approved validity period. If the beneficiary leaves the country, and assuming the job requires an employee with a degree and the beneficiary has that degree, a split decision would be done. These principles do not necessarily apply to other classifications (e.g., Es and Rs have different requirements). For H-1Bs, the issues are pretty constant and straightforward.
KCC is the Kentucky Consular Center. KCC will send the duplicate petition to the embassy or consulate of the beneficiary's choice; the service center does not send the petition directly (like we used to many years ago). Clerical will route the duplicate set of petition and documents as well as CLAIMS updates. All you have to do is annotations, approval stamp with signature (on both sets of petitions), and at least two copies of the I-541 denial notice; staple a Processing Worksheet on the front of the file(s) labeling it as a split decision, and route to Clerical. This is the process unless the beneficiary is a Canadian citizen (by birth or by conversion, as evidenced usually by their passport), in which case we would send the duplicate petition to either pre-flight inspection or the nearest port-of-entry.

Alien Departed prior to filing COS

Q: Alien was not in the US at the time of filing EOS?
A: Split decision if otherwise approvable. See 8 CFR 214.2(h)(15)(i). However, if alien has returned as H1B at the time of adjudication, the officer is not precluded from granting the extension by using the new I-94 number from the last admission.

Q: The alien departed prior to the petition being filed, and returned after the petition was filed – do we deny the case for abandonment? (2nd ed. 4/13/2007)

A: If the alien departed prior to the filing of the COS I-129 petition, the alien is not eligible for a COS because at the time of filing they were not in NI status, even if they return during the pendency of the case. If the petition is approved, a split decision needs to be prepared using the abandonment denial with an alteration to the facts and discussion section to fit the circumstances, as this is not an abandonment denial – they had no status at the time of filing to abandon. (5th ed. 4/18/2007) The alien would not be precluded from filing a new I-129 petition for COS at a later date, as they have already established a cap number with the first petition. NOTE: The alien in this scenario was an F-1 student in OPT… had the alien been a B-2, there would be a question of their intent upon re-entry into the United States, and the second petition might not be approved for COS. Take the current NI classification into account when this situation arises.

NOTE: Aliens who are not in the United States at the time of filing OR have departed since the time of filing are not eligible for COS. If otherwise approvable, a split decision needs to be prepared, and the second copy of the petition will need to be sent to KCC or to the POE/PFI. (5th ed. 4/18/2007)

Alien Departed after COS is filed

Q: Why do we need to deny for abandonment COS's in which the beneficiary is seeking COS from F-1 (OPT) to H-1B (CAP cases), wherein the beneficiary departed the U.S. after filing? The beneficiary has not abandoned their current status, as they are permitted to travel on their F-1 visa…Aren't they maintaining their status? What is the regulatory/legal cite for these denials? (6th Ed. 4/19/2007)

A: 8 CFR 248.1(a) states: Except for those classes enumerated in § 248.2, any alien lawfully admitted to the United States as a nonimmigrant, including an alien who acquired such status pursuant to section 247 of the Act, who is continuing to maintain his or her nonimmigrant status, may apply to have his or her nonimmigrant classification changed to any nonimmigrant classification …

When a nonimmigrant is not in the U.S., technically they are not in status – which is the whole basis for recaptured time in Matter of IT Ascent – The F-1 Visa allows them to depart and return, but for the duration of time that they are gone, they are not an F-1. They reapply for admission as an F-1 upon re-entry. This is a split decision. If the alien returns to the US at a later date, to resume his F-1 OPT, he is not precluded from filing a new I-129 to change status to H1B – with the initial approved H1B (split decision) he would have been counted.

Inadmissibility – Possible Public Charge- Part-Time Position

Q: What concerns should the officer address when the position is Part-Time? (4th ed. 4/17/2007) *amended* (11th Ed. 5/18/2007)

A: The officer will need to take several factors into consideration when the beneficiary is going to be paid part-time in order to determine whether the beneficiary may be found inadmissible as a possible public charge. These factors include: The location of the position (and cost of living in that area), the amount of part- time pay to be received, and the size of the family that the beneficiary is supporting; keeping in mind that any H4 dependents cannot work (a spouse that is also an F-1 or other NI Classification may be able to work). If there is no I-539 attached, the officer can look at SEVIS to see if there are any dependents listed if the beneficiary is currently an F, M, or J. The officer should also keep in mind that there may be income coming in from other sources – properties owned abroad, parents, etc. – the beneficiary could also be working part-time as an H1B while continuing to attend graduate school. There is an RFE that will be added to O:Common in the next few days to address this issue.

Establishing Maintenance of Status

Q: The alien left the US one day after the filing of EOS change of employer but returned as B2 since his H1B status expired. How do I handle this case?
A: If otherwise approvable, a split decision should be issued to deny his EOS because the alien was not in the H1B status any more.

Q: Petition A was revoked on 12/1/07, petition B was filed on 10/1/07 but was denied on 05/02/08. What do I do with petition C filed on 04/30/08?
A: There is no bridge. The alien was out of status as of the date the petition A was revoked since the petition B was denied. Therefore, deny EOS request for petition C, if otherwise approvable.

Q: What is considered sufficient proof that the alien is and will continue to maintain status until 10/1/2007? The beneficiary has completed his F Program. He has submitted a letter from a test preparation school indicating that he has been accepted, and indicates in a statement that he will be attending the test prep school up through the requested start date on the I-129. There is no I-20 for the test prep school in the file. (4th ed. 4/17/2007)
A: This issue has been superseded by Cap-Gap Relief Regulations dated April 8, 2008. (14th ed.)

Q: If the alien is currently an F-1 student that is otherwise qualified, and is due to have his program end with the conference of his degree on June 30, 2007, and there is no evidence in the file or in CLAIMS that shows that an I-539 or I-765 is pending, will I need to do a split decision?

A: This issue has been superseded by Cap-Gap Relief Regulations dated April 8, 2008. (14th ed.)

Q: Is the 60 days departure rule firmly applied? This beneficiary status expires on 7/30/2006 and they ask start date 10/01/2007. Is this is a split decision? (6th Ed. 4/19/2007)
A: This issue has been superseded by Cap-Gap Relief Regulations dated April 8, 2008. (14th ed.)

Q: SEVIS indicates the OPT that the student is currently on expires in June, but indicates as well that the student "plans to continue classes in July". The program dates indicate that the next session begins in July and continues through to 2008. Is this beneficiary going to maintain his status until 10/1/2007? (6th Ed. 4/19/2007)
A: Yes – they may be switching from one education level to another, or getting a 2nd degree. If his next session is listed in SEVIS, then he is still in D/S as an F-1, and can be considered as maintaining that status until 2008.

I-20 ID –
Q: What if the only evidence submitted of an alien's admission is an I-20 ID and there is no evidence in NIIS? (1st ed. 4/12/2007) ***Expanded*** (12th Ed. 3/31/2008)
A: Starting in the early 1980's, school information was entered into ST/SC (Student/School) database from the I-20AB. Alien entered as an F-1 student (they could go to elementary school at that time) and was issued a basic I-20 ID as well as an I-94. Entries from that time are not in NIIS or the archives, and if the student came in as an elementary student and stayed a student since, they may not have any other evidence of admission. So, an I-20 ID is acceptable in lieu of an I-94 to establish admission. However, by August 2003, schools were required to enter into SEVIS all current students and assign an "N" number to the student.

J-1 –
Q: J1 COS to H1B, do I need waiver before filing?
A: If subject to 212(e), yes. Check Mainframe CLAIMS to see whether a waiver was filed or adjudicated. If not, issue a RFE.

Q: The petitioner submitted as evidence of the J-1 waiver the application to the Waiver Review Board without the recommendation from the Board. Is this acceptable? (4th ed. 4/17/2007)
A: No – If the application was approved before October 10, 2006, the recommendation would need to be submitted by mail to the CIS servicing office. If on or after October 10, 2006 the recommendation would be submitted to the VSC. See instructions in Archives, section (c) below...

Q: If an alien was a J-1, filed an I-539 in the past and was approved and changed status to another NI classification, do we need to check if the alien was subject to 212(e)? (2nd ed. 4/13/2007)
A: Presume the officer properly adjudicated the case; if the beneficiary is a physician, however, he/she may have a 214(l) waiver which requires other on-going considerations.

REMINDER: Adjudicators need to verify whether all J-1 exchange visitors (and the J-2 dependents) are subject to 212(e). The three ways in which they can be subject (and all three ways need to be checked) are:
1 – If the program is funded all or in any part by either the U.S. or a Foreign Government directly or indirectly;
2 – If the program is listed on Exchange Visitor's Skills list for the beneficiary's country; and
3 – If the J-1 is a Graduate Medical Student. (1st ed. 4/12/2007) *expanded* (6th Ed. 4/19/2007)

Q: What do I need to look at if the beneficiary is subject to 212(e)? (1st ed. 4/12/2007) ***expanded*** (11th Ed. 5/18/2007), (12th ed. 3/31/2008)
A: If the beneficiary has a No Objection (NOL)/Government Interest Letter dated on or after October 10, 2006 they must have the I-612 waiver approved prior to the filing of the Change of Status Request. Verification can be made, if they do not offer the waiver approval – follow the instructions listed in the Archives section (c) at the end of this document...**NOTE:** Physicians need to have a Conrad 20/30 waiver and can only work at the facility listed on the waiver, as that is the facility that they have been granted to work at, and which meets the requirements for the Conrad 20/30 waiver (being in an underserved area). If the alien is requesting permission to change facilities, see 8 CFR 212.7(c)(9)(iv). Question relating to this issue should be directed to a supervisor or a coach.

Airline Stewardesses
Q: The beneficiary was admitted as an airline stewardess...can they change status? (1st ed. 4/12/2007)
A: Airline stewardesses are admitted as D-1 or D-2's. INA 248 indicates that any nonimmigrant admitted as a D cannot change status.

No Status indicated –
Q: The beneficiary's status is not indicated on the I-129...what action should I take? (6th Ed. 4/19/2007) ***Expanded*** (12th ed. 3/31/2008)
A: If, even in CLAIMS or NIIS, you cannot determine the beneficiary's current status, RFE. Remember to verify that the petitioner has requested an EOS or COS. If requesting consular processing, no verification is necessary.

Different NI classifications changing status to H1B
Q: Can the following NI classification change status to H1B? (2nd ed. 4/13/2007)
A: See each classification below:
S8 – stands for H1A registered nurse/spouse/child. Time as the H1A principal counts towards the six year limit. Due to the recent memo issued, time as a dependent does not.

Check to see if the beneficiary was the principal, and if so, check to see if they left the U.S. for one continuous year. If they were outside the U.S. for one year, they can be recounted and the six years start over. If they have not been out for one continuous year, then the H1A time needs to be counted, and they would be considered an EOS case, as opposed to a cap case.
TN – TN's can change status to H1B's
E3 – Australian Specialty Workers – can change status to H1B's
H1B1 Singapore/Chile nonimmigrants are not precluded from changing status to H1B.
NOTE – Any case fee receipted after 4/15/2007 must be relocated to Vermont, except for E-Filed cases. ***Added*** (11th ed. 5/18/2007), ***Amended*** (12th ed. 3/31/2008)
H3 – Trainees – if less than 18 months, then can change status to H1B – H3 time is counted towards 6 year limit. More than 18 months, they may not be able to COS without specific amount of time outside the U.S....Policy decision will be forthcoming. (8nd ed. 4/23/2007)
WT – Visa Waiver Program Visitors – Any alien admitted as a visitor under visa waiver program or visa pilot program is not eligible to change his/her nonimmigrant status under section 248 of the Act. See 8 CFR 248.2(e). (14th Ed.)

Q: An alien last admitted as WT and had prior F1 status, is he eligible for COS?
A: No, status is determined by last admission. (14th Ed.)

Q: The petition was filed for the beneficiary to COS from A1 to H1B without I-566. What do I do if the petitioner provided no I-566 but excuses for the RFE?
A: COS from A1 must have I-566s. If I-566 was not submitted after RFE, the petition must be denied. The I 566 is mandatory, No matter what the reason, failure to provide said document is grounds for denials. See 8 CFR 248.3(c).

R1
Q: A religious related petitioner filed the petition for an alien to COS from R1 to H1B. The alien has a pending R1 EOS. What is the current policy on the case?
A: Consider the following factors before making the decision—is the petitioner also the R1 employer for the pending case? Is the position a religious occupation? Has the site check been completed for the pending R1 petition yet? If possible, check site reports for both religious organizations if not the same. Is the alien maintaining R status? Has the alien reached 5 years limitation of R status? Is this an attempt to circumvent site check? Please see supervisors if you have any question.

H3 To H1B
Q: I have a case that the beneficiary is going from H3 to H1B. Are there restrictions on a trainee H3 changing to an H1B? (11th Ed. 5/18/2007)
A: There is not a statutory or regulatory prohibition against an H-3 changing to H-1B (or H-1B changing to H-3). There are issues to consider, however, with the COS request:
1. Is the beneficiary maintaining status as an H-3 prior to the filing of the I-129? The intent behind the H-3 classification is, once the training is completed, the beneficiary will return to his or her home country. I would pay particular interest to this explanation from the H-1B petitioner, and if not sufficient, RFE.
2. The time already spent as an H-3 will count toward the 6-year limit for an H-1B. This does not usually cause a problem unless the beneficiary, for example, was an H-1B, changed to H-3, and is now changing back to H-1B.
3. A reason for changing to H-1B may be the filing of a permanent labor certification by the H-1B petitioner. If the labor certification was filed with the DOL prior to the filing of the I-129,

the beneficiary is ineligible to change to H-1B because there is not a dual intent provision for H-3s.

Otherwise, handle this COS just like any other.

Reminder: *Per INA 248, **all** NI classifications **except** C, D, K, WT, WB and some S and V, can change to another NI classification.*

B Nonimmigrants

Q: How do I know that a B non-immigrant is maintaining status? What can B Nonimmigrants do? (10th Ed. 5/1/2007)

A: B-1 visas are for business, including such things as a need to consult with business associates, negotiate a contract, buy goods or materials, settle an estate, appear in a court trial, and participate in business or professional conventions or conferences; or, where an applicant will be traveling to the United States on behalf of a foreign employer for training or meetings. The individual may not receive payment (except for incidental expenses) from a United States source while on a B-1 visa.

B-2 visas are issued for general pleasure/tourist travel, such as touring, visits to friends and relatives, visits for rest or medical treatment, social or fraternal conventions and conferences, and amateur/unpaid participants in cultural or sports events.

In most instances, consuls will issue a combined B-1/B-2 visa, recognizing that most business travel will also include tourist activities. The B1 or B2 may come in as a missionary or religious worker, however he/she can only receive honorary payments.

EAD Card/Parolee

Q: The applicant's previous H1B status expired on 8/22/2006 which at first glance would make him out of status when he filed the I-129. However, he has an EAD that doesn't expire until 2/1/07 and he has an I-94 that shows he was paroled in until 4/21/2007 because he has a I-485 pending. For EOS purposes, is the applicant in status or would this be a split decision? (9th Ed. 4/25/2007)

A: Normally an EAD card by itself does not grant nonimmigrant status and the decision would be a split decision. As this is a case where they are requesting an EOS and were paroled, in approving the petition we are, in effect, admitting the alien as an H1B, which would then grant the alien an extension of stay.

Previous I-129 pending/not approved

Q: The I-129 petition was filed to argue the split decision made on its prior petition. What should I do about it?

A: If otherwise approvable, the officer should do a split decision again since the beneficiary is not maintaining status. Do not discuss the basis for that prior decision just note that the prior COS/EOS was denied and any concerns relating to that denial should have been addressed by filing a timely motion to reopen/reconsider the earlier decision. The officer may want to consider sending the 2nd petition to the NTA unit after issuance of the split decision.

Q: The bene's previous I-129 was denied on 06/23/05 and appeal was transferred to AAO on Sept 05. However, AAO returned the petition to Vermont on March 1, 06. No decision has been made yet. A new petition filed by new employer on Jan 07. What should I do? (9th Ed. 4/25/2007) ***Amended and expanded*** (12th ed. 3/31/2008)

A: If otherwise approvable, this decision will be a split decision, as having a motion pending does not grant the beneficiary status... You may also have an issue with unauthorized employment if the beneficiary has worked more than 240 days (8 months) past the expiration of his/her previously approved petition, if the beneficiary continued to work for the same employer

(see 8 CFR 274a.12(b)(20)). If the alien is changing employers, INA 214(n) <AC 21 sec. 205> is controlling.

Revocation

Q: If the beneficiary's previous I-129 was found to be an auto revocation, is he maintaining his/her status?

A: At least, as of the date of revocation, the beneficiary was considered not in status. However, a new petition could be filed before revocation to cover the gap. The officer must check the system to determine the existence of gap before the current filing of EOS or COS to make sure the beneficiary has been maintaining the nonimmigrant status. (14th ED.)

Pending Legalization –

Q: Is an alien with pending legalization with an approved I-765 eligible to change status? (2nd ed. 4/13/2007)

A: Legalization by itself does not extend an alien's nonimmigrant status or grant eligibility for change of status.

TPS

Q: The beneficiary is currently in TPS status. Can they request a change of status? (9th Ed. 4/25/2007)

A: Aliens under TPS can change status, as long as they are maintaining the TPS status. If the TPS status expires, then the alien reverts back to the status held prior to the TPS being granted and would most likely not be eligible for COS. According to statute and regs: INA 244(a)(5) - The granting of temporary protected status under this section shall not be considered to be inconsistent with the granting of nonimmigrant status under this Act. 8 CFR 244.10(f)(2)(iv) For the purposes of adjustment of status under section 245 of the Act and change of status under section 248 of the Act, the alien is considered as being in, and maintaining, lawful status as a nonimmigrant while the alien maintains Temporary Protected Status.

In status on 10/1/07?

Q: Is the beneficiary maintaining status if they indicate that they will file for an extension of stay in their current classification until the 10/1/07 start date for the H1B COS? (2nd ed. 4/13/2007)

A: If the beneficiary states that they intend to file an extension, check CLAIMS to verify whether anything is pending – if they have not filed anything yet, then they have not established that they will be in status on the 10/1/07 start date. If the pending I-539 and/or I-765 is here in the CSC, then email CSC PPhelp to get those files pulled and adjudicated. If they have filed with VSC, TSC or NSC, the SC that is in possession of the file(s) can be contacted to adjudicate the I-539 and/or I-765 prior to adjudication of the I-129. (5th ed. 4/18/2007) The beneficiary/applicant must establish that they will be in status, not just propose that they will be in status.

Q: What if the I-539/I-765 that was filed to extend their stay has to be RFE'ed? What does that do to my I-129? (5th ed. 4/18/2007)

A: If the I-539/I-765 has to be RFE'ed due to lack of evidence, then the beneficiary has not established that they will be in status and a split decision will need to be prepared. When writing the denial, when addressing the extension/work authorization, indicate that the I-539 or the I-765 has not been approved.

Q: The I-539 that the beneficiary filed for an extension indicates that they wish to change to or extend their stay as a B – can they? (5th ed. 4/18/2007) ***Amended*** (12th Ed. 3/31/2008)

A: The alien can, so long as he is otherwise maintaining his/her current nonimmigrant status, apply to change to another nonimmigrant status. When adjudicating a COS or EOS to a B, keep

in mind that the alien has to establish that their stay is temporary and that they have a foreign residence that they have no intent to abandoning. If there is an I-129 filed on their behalf, the officer will have to determine whether this is truly a temporary visit with an intent to depart the U.S. Generally, the fact that there is an I-129 filed on their behalf may lead an officer to believe otherwise, and deny the I-539, setting up the groundwork for an I-129 split decision as the alien will not be in status at the future start date.

Prior Time Spent out of Status –
Q: Do we take any action if, prior to their current status, the alien overstayed or was out of status and departed the U.S.? (1st ed. 4/12/2007)
A: We will not consider the prior out of status time EXCEPT for calculation of possible Unlawful Presence.

Unlawful Presence –
Q: When do we start counting unlawful presence? Does it affect the beneficiary's ability to change status? (5th ed. 4/18/2007)
A: No unlawful presence will be gathered while a petition or application is pending; however, having a petition or application pending does not establish status.

CPT and OPT
Q: What is CPT? What is OPT? (1st ed. 4/12/2007)
A: Curricular Practical Training – Work that is required in order to get the degree... for instance, part of the requirement for a Bachelor's in Architecture is that you serve as an intern in an Architectural firm for a certain # of weeks/months...If the beneficiary is currently participating in CPT, they have not completed all requirements for the degree. CPT completion is a requirement to obtain the degree, not an option. (5th ed. 4/18/2007)

Optional Practical Training is granted during they school year or after the degree has been conferred or after they have met all the course requirements– the student is eligible for up to one year of OPT. Evidence? An EAD card or check the SEVIS record. See 8 CFR 214.2(f)(9).

F-1 Students graduating after the filing date/OPT availability
Q: What happens when the start date requested is 10/01/07 and there is a letter in the file that says the beneficiary will be given a master's degree in June? All requirements have been completed. Do they have to have the degree certificate or diploma in hand or just have completed the requirements? Do the requirements have to be completed before filing the petition, before adjudication, or before the employment start date of October 1? (1st ed. 4/12/2007)
A: If they do not have a degree they are required to have either a transcript showing that they have completed all of the requirements. If the transcript does not show that they have completed all the requirements, then a letter from a college official in addition to the transcript would be acceptable... see Archives section (a) below for further details... **NOTE:** A letter from the school without the transcripts is not acceptable. RFE for the transcripts. (5th ed. 4/18/2007)

Q: If the alien does not have the degree certificate or diploma in hand but has completed all requirements for the Master's degree, can the alien get Optional Practical Training? (1st ed. 4/12/2007)
A: Yes, they can get OPT during the school year, and prior to their degree being conferred...see Archives section (b) below for further details...

Q: If the person has not finished their course of study for the master's degree, we deny them. Is it the same concept for a bachelor's degree? I have a current student who has a letter from the school stating he has to complete 4 more classes in order to graduate and that he is on the list to

graduate this spring. I would think we would have to deny him also...what happens if he does not pass? (6th Ed. 4/19/2007)
A: Yes – the only reason why we would approve those without the diploma is that all the course and other requirements have been met – if push came to shove at the school they have already passed all requirements they could get the diploma tomorrow – they are just waiting until the graduation ceremony so that the diploma can be issued. The beneficiary in this instance has NOT met all his course requirements and therefore is not qualified at the time of filing...

Passport
Q: What if the beneficiary, who is in valid Nonimmigrant Status until 2008, has an expired passport? What action should we take? (5th ed. 4/18/2007) ***amended*** (12th Ed. 3/31/2008)
A: The officer needs to RFE for a valid passport – a valid passport at the time of filing is required, except for Canadian citizens.

FRAUD Questions

5:1 Ratio Profile
Q: What is the 5:1 Ratio? (2nd ed. 4/13/2007)
A: The 5:1 project was a 30 day sweep to find H1B petitioners that fit into a certain profile that tended towards fraud and/or abuse. While the project and sweep are no longer in effect, if an officer finds that an I-129 fits this profile and/or otherwise warrants attention, they can RFE for contracts and/or send a Request for Assistance to CFU. The indicators include businesses with a low annual income (generally less than $5 million, low number of employees, with an abnormally high rate of filings in a very short time (e.g., $1 million gross annual income with 10 employees that has 100 or more filings in the past year). The ratio that was used as a suggested threshold, though not a firm guideline, for the project as far as filings was 5:1 - if the company files 5 times the number of petitions and applications than the number of employees.

Q: Are we still checking the petitioner for 5:1 ratio?
A: No. Five to one ratio will be one of reasons the petition being forwarded to CFDO (Center Fraud Detection Operation) but not the sole reason. We would still check the petitioner with multiple filing for the same beneficiary.

OSCAR List – Fraud Digest
Q: The petitioner is on the Fraud Digest List – what do I do with it? (5th ed. 4/18/2007) ***revised*** (12th ed. 3/31/2008)
A: The Fraud Digest is in 2 parts – the Index and the Digest, itself. The Index simply gives a list of the companies, attorneys, schools, etc. of interest. If the officer finds that a party of their case is listed on the Index, the officer needs to look at the actual Digest to determine why the company is on the list and what actions, if any, the officer needs to take. The Fraud Digest is located in the CFU folder in O:Common. The Fraud Digest has web links from the Index to the Digest. The adjudicator will need to read the Digest information carefully. It may indicate that the company is no longer a specific adjudication concern, This is shown by "OK" at the beginning of the entry.

PROCESS Questions

NOTE: The following is a list of the most common errors found by AST – these items should be carefully scrutinized to verify that the information is complete and correct...remember that these

issues may affect the approval notice print process, and can generate inquiries/requests for correction. (9th Ed. 4/25/2007) ***Revised and expanded*** (12th Ed. 3/31/2008)

- ✓ Validity date incorrect or missing
- ✓ Classification missing; incorrect status or classification
- ✓ Officers did not pull second copy of I-129 petition to send to KCC – This includes EOS & COS.
- ✓ Missing I-94 for EOS or COS or I-94 included but annotated the wrong/incomplete I-94 number
- ✓ Bene birthday not included (or incorrect)
- ✓ Bene citizenship incorrect
- ✓ Officer did not stamp deny/approved or is missing signature
- ✓ Decision on I-129 but nothing on I-539 (I-129 approved but nothing on I-539)
- ✓ I-824 is approved for notify to consulate, but officer did not make I-129 petition copy for clerk to send to KCC.
- ✓ Officers forgot to order RFE, ITD, ITR, deny and withdrawal.
- ✓ WAC # doesn't match file on RFE notice, etc.
- ✓ Address is incorrect from CLAIM3 and petition/application – make sure CLAIMS and the petition both have the correct address.

The following is a list of common errors seen by Division 12.

- ✓ Country of Citizenship is different from Country of Birth. Change CLAIMS to COC in the COB Field. If the case is a COS case, the COC should show the COB. If requesting consular processing, COC should be the country of citizenship.
- ✓ Ensure that CLAIMS information is complete (Name, DOB, COB, etc.)
- ✓ Australia is coded "RALIA" in CLAIMS, not AUSTR, which is French Polynesia. Austria is STRIA.
- ✓ Tasmania is TASMA in CLAIMS. People from Tasmania may also be Australian Citizens.
- ✓ Niger vs. Nigeria – in CLAIMS, Niger is NIGER; Nigeria is NIGIA
- ✓ TAIWAN = AIT, not CHINA. China = People's Republic of China = Mainland China.
- ✓ Split Decisions without I-541.
- ✓ Name corrections require new IBIS Checks. If the name is spelled incorrectly or the date of birth is incorrect on the notices, this will result in an IBIS error.
- ✓ Remember to mark the petition if the dates granted do not match the requested dates.
- ✓ Ensure that any annotations – ESPECIALLY DATES – are in legible handwriting – Clerks are making errors as they cannot decipher the writing of the adjudicator.
- ✓ Make sure that any attached applications (I-539's, etc.) are complete
- ✓ Incorrect Classification given
- ✓ No I-94 number in CLAIMS
- ✓ New Attorney (with G-28) is not updated in CLAIMS

Motions

Q: <u>What do we do when an untimely filed motion for a denial due to no ACWIA fee, and the ACWIA fee is sent with the motion?</u> (11th ed. 5/18/2007)

A: Per HQ, dismiss the untimely motion and refund the ACWIA fee.

Q: <u>The I-129 petition was denied and a motion was filed. The case was opened with ITD. Then the petitioner withdrew the case. How does the officer update in CLAIMS?</u>

A: As standard, the I-129 case would be updated as withdrawal since it is treated as a new or pending case once it was reopened due to the motion. On the notice of withdrawal, be sure to

give history as it relates to the dates of the denial and filing of motion, and add "MTR" to the receipt number. See 8 CFR 103.2(b)(6) . (15th Ed.)

Revocation

Q: Do I need to pull the prior petition which is a revocation in order to proceed with the current petition I have now?

A: Check case history in CLAIMS for the revocation first. If the revocation was issued without action of Intent to Revoke, it often was an "auto revocation" due to withdrawal by the petitioner. Then the current petition may be adjudicated without review of the prior petition—revocation. However, if the revocation was issued after the action of Intent to Revoke, it may involve fraud or other adjudicative issue returned by the consular offices. In this scenario, it is better to review the revocation case before processing the current petition to make sure that the beneficiary has been maintaining the H1B status. Note: the beneficiary was out of the status as of the date the petition was revoked.

SQ94 -

Q: Since there is already a SQ94 print-out in file by the contractor, do I have to place another SQ94 print-out in file? (7th Ed. 4/20/2007)

A: Yes, if the SQ94 print-out in the file is not within 15 days of adjudication for either an EOS/COS approval or denial, then a current SQ94 print-out should be placed in the file. Refer to the following HQ memos:
3/18/2002: Enhanced Processing Instructions
4/05/2005: Revised Enhanced Processing Instructions

Q: What is considered evidence of a SQ94 search if *No Arrival or Departure Record* is found? (7th Ed. 4/20/2007)

A: If the search results in a *No Arrival or Departure Record* using the I-94 number, the following three print-outs must be in the file as proof of a SQ94 check using the following searches:

- I-94 number
- Name and date of birth
- Passport number

I-94s

Q: The beneficiary provided a copy of I-539 reinstatement without I-94 number as evidence of maintaining his/her current F1 status. Can the beneficiary change his/her status to H1B without I-94 information?

A: Neither the approval notice of I-539 reinstatement or that of I-824 show validity dates or I-94 numbers. Therefore, it is all right to adjudicate the COS petition by checking out the latest I-94 number in SQ94/NIIS.

Q: Under what circumstances do we issue a new I-94 to a Canadian? What are the proper procedures? (7th Ed. 4/20/2007) ***amended*** (12th ed. 3/31/2008)

A: If the Canadian citizen did not have an I-94 previously issued to them when they entered (came in as a B NIV for example), then we need to issue them an I-94 # or their approval notice will not print. To do this, first the officer should see Anisa Tailor in AST. She will give the officer a blank I-94. Write the I-94 # on the I-129, and update CLAIMS with the I-94 #. Staple the blank I-94 in the file on the non-record side so that it cannot be used again. From then, the officer can continue adjudication.

Q: The beneficiary claimed he/she lost the last I-94 and asked for replacement with I-102. However, the I-94 number provided by the beneficiary is used by another in SQ94/NIIS. What do we do to resolve it?
A: RFE to obtain the original passport containing the admission stamp showing her/his claimed entry or if CLAIMS shows a prior petition with a different I-94 number that is not in SQ94/NIIS then use the new I-94 number as the basis of action.. (14th ED.)

Number of Employees
Q: A check of CLAIMS Mainframe found out the petitioner has a total of 124 cases - On #12 of the petition the current number of employees is 63. Where are the other 61 beneficiaries? The company was established in 2003. Should we worry about the rest of the petitions? (7th Ed. 4/20/2007)
A: The number of petitions, which can be an indicator, does not necessarily signify that there is a concern on the number of employees. You need to keep in mind a few factors: Some of the beneficiaries filed for could count for more than one petition, attrition, and that some of the beneficiaries of the petitions you see may never even have started work for the employer... A general guideline when we become concerned is the 5:1 ratio – 5 petitions to 1 employee... This is not concrete by any means, and if there are more indicators of fraud then the 5:1 ratio may be more or less... See section (f) of Archives for full text of answer...

Split Decisions
Q: What denial forms do we use for split decisions? (6th Ed. 4/19/2007)
A: EOS – All cases need an I-541 denial.
COS – Not timely filed (only issue) – use the notice in CLAIMS
- All other scenarios – use the I-541 Denial.

Q: What start date do I give on a split decision? (6th Ed. 4/19/2007)
A: Approval is from the date of adjudication or a future date – they do not go back in time.

Q: Under what circumstances can I use the denial letter automatically generated by CLAIMS? (5th ed. 4/18/2007) ***Amended*** (12th ed. 3/31/2008)
A: The CLAIMS automatically generated denial notice, in which no separate I-541 denial would need to be prepared, is only used when the petition is UNTIMELY FILED and no reason given for the untimely filing. Non-maintenance of status prior to the start date would need an I-541 written by the officer.

Appeal before AAO
Q: What action do I take if the H1B in front of me looks approvable but a check of CLAIMS finds that the previous petition filed by the petitioner for the same beneficiary was denied and is on appeal with the AAO? Would this be a cap case or have they already been counted? (6th Ed. 4/19/2007)
A: Per HQ guidance in the form of a memo, this case, and any others in which a previous petition is before the AAO must be held until the AAO makes a decision on the prior case. Regarding the cap, cases aren't counted and visas aren't issued until the case is approved, so – no, the case was not previously counted.

Interfiled petitions/applications
Q: I have found, in reviewing the I-129, that the I-539 and evidence for it is interfiled with the I-129...What action should I take? (5th ed. 4/18/2007)
A: Officers are finding I-539s along with evidence in between the I-129 Evidence. Some of the officers have also found some I-824's. The officer needs to pull these I-539s and documents and

get them to SCOT. We either need to place them in a new file jacket if they were fee'd in or send them back to the petitioner/beneficiary for the correct fee.

Consular Processing/POE's/PFI's

Q: The petitioner has marked PFI on Part 4 of the petition, but has not listed the PFI or given the alien's Canadian Address. How can I determine where to send the petition? (9th Ed. 4/25/2007)
A: Look in SQ94 to see if the alien made any prior entries, and if so, what was the POE listed on the SQ94 screen? That may give you the answer you need. Otherwise, look through the file to see if there is an address anywhere for the beneficiary - a resume, perhaps?

Q: What do we do when the petitioner has submitted only one copy of the petition and it needs to go for consular processing?
A: For the petitioner to have AMCON notification on either EOS or COS, the petitioner must request the notification and submit a complete duplicate set upon filing. If there is no duplicate set or incomplete duplicate, and the petitioner requested AMCON notification, the officer will adjudicate the case and place 2 copies of the memo--824letter.doc in o:\common in the file for clerical to mail out to the petitioner. Clerical will also affix the labels. If there is a split decision but no duplicate was provided, the officer can approve the case and place 2 copies of the memo-824letter.doc in file for clerical to process also. If it is determined by the officer that the petitioner is requesting AMCON notification and a RFE is required for some other issues, the officer can request the petitioner to submit a complete duplicate for AMCON notification. However, the officer should not issue an RFE for the sole purpose of obtaining a duplicate set of documentation. (14th Ed.)

Q: When the beneficiary is in/from Canada, who gets consular processing and who gets processed at the POE or PFI? (5th ed. 4/18/2007)
A: Canadian citizens will get processed at the port-of-entry (POE) or the pre-flight-inspection (PFI). Landed immigrants or other non-citizens of Canada get processed at the consulate.

Q: What about if the beneficiary is a naturized citizen of Canada and asks for Consular processing? Do we grant their request and send it to a consulate, or do we change the consular notification to POE/PFI? (8th ed. 4/23/2007)
A: It depends on the circumstances. Sometimes, if the alien is overseas (not coming from Canada) and will be boarding a plane in Paris, for instance, we may send it to KCC for a "courtesy" notice. The alien may want to apply for visa, even though it is not needed, to avoid problems boarding a plane from Paris to the US. However, if the petition shows Canadian address, send it to a POE or PFI.

Q: Is there a more up-to-date list of the visa issuing posts? (5th ed. 4/18/2007)
A: The Visa Issuing Posts list that is in O:Common and was a part of the training materials given in the last few H1B training sessions is not the most up-to-date...because the list is not constant – it changes on a regular basis. If the petitioner requests consular processing at a post not listed, go to the State Department's Reciprocity List & Country Documents Finder (a.k.a. the FAM) and see what posts are listed for the country that the petitioner is requesting. If it is not in the FAM, then there is not a visa issuing post in that area and a nearby post will need to be selected.

IBIS

Q: Do I have to run an IBIS query on employment-based petitioners? (11th Ed. 5/18/2007)
A: No. Employment-based petitioners that are business entities do not need to be queried. Sole proprietorships are considered business entities so they do not need to be queried. Exception:

Individual persons that are not considered business entities must be queried. See pg. 12 of the IBIS SOP.

Q: Do I have to place an IBIS stamp on the petition for a business petitioner? (11th ed. 5/18/2007)
A: Yes. Per IBIS SOP, p. 40, "...IBIS queries are not required for business petitioners on employment-based petitions. The adjudicator must apply the IBIS stamp near the subject's information on the application/petition, circle "NR" for "Not Required", and annotate inside the stamp the date it was determined that IBIS was not required. If more than one beneficiary on a multi-beneficiary I-129 petition does not require an IBIS query, USCIS personnel are only required to apply the IBIS stamp once and annotate inside the stamp the number of beneficiaries not requiring a query."

NSEERS
Q: When do we check NSEERS?
A: See NSEERS I-129 Processing Instruction—When to RFE in o:common\adj\NSEERS\SOP for details.

Fees
Q: Does the petitioner, UCLA, need to submit Fraud fee if the alien's prior employer is UC, Merced?
A: No, all10 campuses of University of California are governed by the Regents. Therefore, UCLA is exempt from Fraud fee.

Q: Is there a lesser fee on H1B renewal cases? (4th ed. 4/17/2007)
A: Maybe – if same employer, yes. If new employer, then no.

Q: Can we RFE for higher ACWIA fees when it appears by the # of petitions filed that the petitioner has 25 or more FTE employees? (6th Ed. 4/19/2007)
A: No – per HQ guidance, do not RFE for the difference in the ACWIA fee. If, however, you receive evidence of the # of employees and you find that the petitioner does in fact have 25 or more FTE employees, then you can RFE for the difference in the fee.

Q: How do we calculate the ACWIA fee when the petitioner has part-time employees? Scenario: The petitioner paid an ACWIA fee of $750, while indicating that he had 35 employees. In response to the RFE, the petitioner indicated they have 24 F/T employees and 11 P/T employees, and therefore does not have to pay the full $1500. Is there a ratio of # of P/T employees equals 1 F/T employee? What is the regulatory cite for a denial? (11th Ed. 5/18/2007)
A: INA 214(c)(9)(B) requires the lesser fee for those with not more than 25 full time equivalent employees. The statute presumes that the ACWIA fee will be $1500 unless the petitioner shows otherwise. In this case 24 F/T and 11 P/T add up to at least 25 F/T equivalent positions. Adjudicators do not routinely challenge the number of employees, but if inconsistencies are found, the adjudicator should look more closely at the case.

Q: The alien has been the beneficiary of multiple I-129 petitions; the current petition appears to be the 1st extension filed by this petitioner for this alien. Does the petitioner qualify for ACWIA fee exemption?
A: Check the petition to make sure that there are no employer name changes, merger, or acquisition changes which may qualify the petitioner for fee exemption before the issuance of RFE for ACWIA fee.

SEVIS Printout –
Reminder: ALL F, M, and J Nonimmigrants must have a SEVIS printout in the file (1st ed. 4/12/2007), **unless** the petitioner is requesting consular/POE/PFI notification. (2nd ed. 4/13/2007) ***Expanded*** (12th Ed. 3/31/2008) The purpose of the SEVIS printout is to verify the status of the alien. SEVIS is updated with an F, J, or M alien registers under NSEERS. In lieu of the NSEERS printout, you may print out the NSEERS screen in SEVIS to verify registration.

SEVIS Status –
Q: What is the meaning of Deactivated in the SEVIS record status field? (2nd ed. 4/13/2007)
A: Typically, the student will retain the same N# for the entirety of their student status, and the officer, when doing a search using the N# will see multiple records for a student if these transfers/changes have occurred. The current record will show Active, and the previous records will show Deactivated. If the SEVIS record indicates Deactivated, look to see if the student transferred to another school or educational level. There may be circumstances in which the student is issued a new N#, so if the officer finds only a deactivated record in SEVIS, it is recommended that the officer run a name/dob search in SEVIS to see if another N# was issued.

(b)(7)(e)

I-765's –
Q: What eligibility code do I give the dependent spouse of an L or E on the I-765? (2nd ed. 4/13/2007)
A: The most up-to-date information on the eligibility codes for E and L dependent spouses is listed on the Instructions to the I-765.

I-824's
Q: What do I do with the I-824 that is attached to the I-129? (1st ed. 4/12/2007)
A: Any I-824 attached to the I-129 needs to be adjudicated by the officer – the clerical staff or the officer will update when the I-129 is updated.

CLAIMS Updating –
Q: Does the SEVIS N# needs to be entered into CLAIMS? (2nd ed. 4/13/2007)

A: IF you have an F, M, or J requesting a change of status to an H (or any other classification), verification needs to be made in CLAIMS that the SEVIS N# is correctly listed on the beneficiary screen. If it is not, the officer **MUST** correct it and save the changes. If this is not done, SEVIS will not be updated when the decision on the COS is made.

RFE

Q: If the officer chooses to make a telephone request for evidence, what must the officer document to establish the RFE?

A: The notes must be legible by the writer (the officer) including the date/time of phone call, the name of the person whom you called or spoke with, the discussed issues, and the requested documents.

Previous Filings

Q: How do I determine when the beneficiary first entered as an H1B? (6th Ed. 4/19/2007)

A: You will need to backtrack through the previous petitions in CLAIMS and you may need to check SQ94 afterwards. For instructions on backtracking through CLAIMS, see Archives (f) below...

REMINDER: When adjudicating an amended petition asking for corrected validity dates, be aware of both the to and from dates to ensure they follow the LCA, dates requested AND any licensing issues. (7th Ed. 4/20/2007)

H4 Dependents

Q: The dependent H4 was not in US at time of filing EOS. Deny him/her?

A: If the H4 visa expired at the time of adjudication, deny EOS. If visa is valid, it is all right to proceed with adjudication if the alien returned US.

Q: How do I process the H4 Dependents when there are multiple applicants on the I-539 and one of the children is about to reach, or has reached the age of 21? (6th Ed. 4/19/2007)

A: If the child has turned 21 prior to the date of adjudication, then a split decision will be done in CLAIMS, and the remaining applicants can be approved, if otherwise eligible, for the time requested. A denial letter will need to be prepared for the 21 year old applicant.

If the child is turning 21 after adjudication and during the time requested, the officer should, if otherwise approvable, approve the decision but limit the "to" date to the day before the child's 21st birthday.

QUOTA Issues

REMINDER: Quota-exempt cases can **IMMEDIATELY** start employment upon approval. These include Universities, Non-profit research institutions, etc. Be sure to look at the petitioner and at the date of requested employment to determine visa availability. (8th ed. 4/23/2007)

Cap exemption

Q: Does employment by US Government such as Dept. of Defense as a research contractor qualify for cap exemption as employment of government research organization?

A: No. The contract needs to be with the specific research group within Dept. of Defense. That is, the employment must be with research command at a command site.

Error in Cap Eligibility

Q: What do I do if we receipted a case and found that the petitioner made an error indicating eligibility for the Cap on the petition? (11th Ed. 5/18/2007)
A: We deny the petition. For example, if the petitioner marked on the petition that the beneficiary was the holder of a U.S. Master's degree and we accepted it under the Master's Cap and the adjudicator determined that the degree is actually a foreign degree, then a denial would be issued. There are no fee refunds, because it was a petitioner error. If, however, the petitioner was not aware the master's degree had to be a U.S. school and marked the petition properly as, "no the school was not a U.S. school", and we accepted it under the Master's Cap then it would be our error. It would have to go back to the contractor for a rejection and fee refund because it was a service error.

Already Counted?
Q: What action should I take? A beneficiary is approved from F-1 to H-1B for a well-known university (cap-exempt) for three years. During this three year period, a computer consulting company (which is not cap-exempt) files a petition in behalf of the same beneficiary. This petition is approved and the beneficiary is extended and counted against the H-1B cap. A third company has now filed a petition in behalf of the same beneficiary; evidence submitted with this petition shows that the beneficiary has never worked for the computer consulting company, but rather has continuously worked for the university. Does this beneficiary need to be counted, as they did not actually work for the cap company? (8th ed. 4/23/2007)
A: The beneficiary does not need to be counted against the cap again.

Not Eligible for Recount?
Q: When is an H1B eligible to be recounted? (1st ed. 4/12/2007)
A: If the alien is requesting that the 6 year clock be reset, but you find that they have not spent a continuous year outside the U.S., they are not eligible for recounting. They should, however, be considered as an EOS case.

Q: What if the alien changed to a different nonimmigrant classification for more that one year...Is that considered sufficient for resetting the clock? (3rd Ed. 4/16/2007)
A: The alien must be OUTSIDE the U.S. for one continuous year. The only NI classification that the alien can be admitted as that will not 'break' that continuity is time in B status, however, time in B NI status does not count towards the one year timeframe, either. E.g. – H1B leaves the U.S. and re-enters 9 months later as a B for three months. The alien has not met the 12 month requirement. Even though the B time did not make a break in the 12 months, the 3 months in B status will not count towards the 12 month requirement. The alien will need to stay outside the U.S. another 3 months to have his 6 years reset.

Q: Can the beneficiary's time be reset? The beneficiary was classified as an H for six years, and then changed status in the US to an O-1 which she has been on for the last couple of years. Is the beneficiary now entitled to another six years of H time since it's been at least one year since she's been in H status? The beneficiary does not qualify for any exceptions to the 6 year rule... (11th Ed. 5/18/2007 ***Amended*** (12th Ed. 3/31/2008)
A: The regulations (8 CFR 214.2(h)(13)(iii)(A)) state that a beneficiary once classified as an H-1B may not change back to H-1B unless he or she has been physically outside the U.S. for the immediate prior year. In other words, it's permissible to change from H-1B to another classification such as O-1, but the beneficiary can't change back to H-1B unless they reside out of the U.S. for one year. Be mindful that an alien eligible for AC21 Section 104 or 106 status may change back to H-1B from another non-immigrant status as long as the alien is otherwise maintaining their status (i.e. H-1B to O-1 to H1-B).

Eligibility for Advanced Degree Cap

Q: Can the beneficiary use a U.S. Bachelor's degree and experience to qualify for the Advanced degree cap? (1st ed. 4/12/2007)

A: The Master's degree must be 'earned' from a U.S. institution; the Bachelor's + 5 years of experience do not qualify for this Congressional exception to the overall H-1B cap. Deny.

Q: The H1B Data Collection Form indicates that the alien is in a U.S. doctorate program, but it does not show that a degree was conferred or that the alien has a U.S. Master's degree...Are they qualified for an Advanced Degree cap H1B? (3rd Ed. 4/16/2007)

A: The adjudicator will need to look at a couple items on the alien's transcript and determine how he alien entered the program and with what degree, as well as where they are in the doctorate program. See Archives, section (e) for further instructions...

Q: Is American University in Beirut a US based University for Advanced Degree Cap case purposes?

A: There are lots of American Universities all over the world. Not every American University is qualified for Advanced Degree Cap. For example, the American University of Beirut was founded under a charter from the State of New York. The University is registered with and recognized by the Department of Education of New York State since 1863. In the US, the American University in Cairo is licensed to grant degrees and is incorporated by the State of Delaware. On the other hand, the American University in Dubai only holds an agent's license issued by the District of Columbia Education Licensure Commission. Here is some information about other American Universities—

American University of Kuwait
Contract with Dartmouth to develop curriculum
US accreditation not shown

American University of the Caribbean
Accredited only
Affiliated with US Hospitals for Clinical Elective Rotations

American University of Afghanistan
Contract with Dartmouth to develop curriculum
US accreditation not shown

American University of London
Distance Learning Program
US accreditation not shown

American University of Paris
Accredited
Incorporated in Delaware
Registered in the US as a 501(c)(3) non-profit

American University of Kosovo
Primarily a Jr. College
Student Exchange agreement with Rochester Institute of Technology
US accreditation not shown

Requests for Starts earlier than 10/1/2007 –

Q: What do we do if the petitioner is asking for a start date prior to 10/1/2007? (2nd ed. 4/13/2007)

A: There are three options depending upon the facts of the case –

1. Quota exempt cases can start at any time.
2. For those individuals from Chile/Singapore the FY 2007 quota has not yet been met and so would be eligible to have an earlier start date.
3. For all others: on advanced degree cases we will deny because a visa number is not available for FY 2007. If they don't qualify for a 2008 cap number we should deny without refund. They filed and it made it to the floor for adjudication – thus we will make a decision.. (9th Ed. 4/25/2007) ***Amendment***

Advanced Degree vs. regular quota

Q: Why is there an advanced degree quota in addition to the regular quota? (4th ed. 4/17/2007)

A: After WWII, the country needed many individuals with college degrees in order to expand the economy and create jobs. In response, Congress created the H1 program. At that time there were no limitations on the number of aliens who could enter under this program. In 1990, Congress determined that the future numbers should not exceed 65,000. In the late 1990's, Congress raised the quota in response to Y2K concerns and the booming economy. Since then, the basic quota has returned to the congressionally-mandated 65,000. Congress then realized that the quota was limiting the admission of aliens who were job-creators and economy expanders, especially those holding an advanced degree. Further, as a result of 9/11, U.S. colleges and universities were no longer obtaining the diversity of students from abroad as before that contributed to a well-rounded education. To encourage foreign students to study at the graduate level in the U.S. as well as create jobs and improve the economy, congress created the 20,000 per year advanced degree cap.

ELIGIBILITY Issues

Specialty Occupation

Q: How can I tell whether the position is a specialty occupation when the duties listed are so technical that I cannot determine what the beneficiary will be doing? (6th Ed. 4/19/2007)

A: RFE the case, requesting that the petitioner submit a job description, including all duties, in non-technical terms. If the petitioner cannot explain what the beneficiary is doing, then we can deny, as they have not established that the position is a specialty occupation.

Wage

Q: Do poverty guidelines apply to non-immigrants?

A: No, poverty guidelines may apply to immigrants but do not apply to non-immigrants including H1B, B, or even F. For students, they must demonstrate with documents that they are able to pay for their study and any expense while they remain in US. Poverty guidelines do not apply to the sponsors whom are listed on I-134s. Remember all non-immigrant aliens must otherwise establish that they will not become a public charge.

Q: An IT company filed the petition with LCA showing the prevailing wage about $72,000 for the offsite position in San Jose area. However, the wage indicated on the petition was $53,000. Should the officer address the discrepancy?

A: Generally, the enforcement activities relating to prevailing wage is the responsibility of DOL. Under DOL rules, no action can be taken until the employer has not paid the appropriate wage. There is no statutory or regulatory provision for prospective enforcement of this issue. Thus, it is not issue on AMCON notification, Change of Status or Change of Employer cases. If an

employer did not pay an alien in the past the appropriate wage, we can consider action under the revocation provisions. See 8 CFR 214.2(h)(11)(B)(iii)(A). (15th Ed.)

Models – H1B3's

Q: What criteria do I look at when I am adjudicating a model? (10th Ed. 5/1/2007)

A: Regarding H1B3 models (in Claims they are just H1Bs): These are so rare, most officers probably won't see any. H1B models obviously do not require a degree. They were included in H1B way back when because HQ didn't know where to put them. When AAO ruled that models with high salaries ($250 per hour and more) could qualify as O1's in the business category, most high profile models use that road. But once in a while we get an H1B.

Look for:

1. The high salary
2. An established agent or agency (like the Ford Model Agency in NY) that represents them. A good way to verify a top agent/agency is to RFE for names of other high profile models they represent. The top agencies listed below in this e-mail is a good reference.
3. A contract with the work itinerary, salary, clients, etc.
4. Past history of work and representation
5. Magazine covers, ads, articles from major model/glamour magazines (always ask for circulation numbers)
6. Awards, recognition, etc.

Internet checks of the model, agency, etc.

Usually H1B3 models command $250 per hour and this would meet one of the H1B3 criterion in establishing distinguished merit and ability. High remuneration is also a criterion for the O classification, as well. $25 an hour would not meet such criteria. Since most of the petitioners are agents please make sure that there is a contract that spells out the terms of the contractual relationship. Also, these aliens need an itinerary of events. Please review your law books for the types of evidence required to establish eligibility for the H1B3 or O classification. Remember, many high profile models are not as well known as Elle MacPherson and Tyra Banks. So use the whole range of considerations listed above when adjudicating H1B models.

Strike/Lockout

Q: I have a petition here from a non-profit organization. Enclosed with the petition is a Collective Bargaining Agreement between the petitioner and UAW. I seem to recall that H-1B1 has a no-strike clause, or can not go on picket/strike. If this is true, how shall I ensure, thru RFE, the petitioner is made aware of this restriction? (10th Ed. 5/1/2007)

A: H1b are not prohibited from striking. They are prohibited from crossing the picket line and the employment of the alien would adversely affect the wages and working conditions of US employees, as certified by DOL. Since this office has not received such a certification, it is not an issue.

Previous Work Authorizations

Q: If the beneficiary is currently working while in L2 status, do we have to count that time? So are they still considered to be under the L2 which is not countable towards the six year maximum time limit? (7th Ed. 4/20/2007)

A: Per the December memo, dependent time – including time in which employment is authorized – is not counted towards the 6 year limit.

Contracts –

Q: What should I be looking at when examining a contract? (6th Ed. 4/19/2007)

A: As a general guideline ONLY – look to see who the parties of the contract are, what the duties or the job being contracted actually is, how long is the contract for, who has control of the persons that are doing the contract work – look at all related supplements – there may be a Purchase Agreement or a Work Order. It is a bonus if the beneficiary's name is listed in the contract, but by no means required. The contract should ideally be good for at least a year.

NOTE: See O:\ADJ_div\ I-129_H1b1\Computer Consultants.doc for guidance on jobs in the computer industry. Note that this is local internal guidance only and not for public dissemination. (11th Ed. 5/18/2007)

Q: A staffing firm, new business, has income less than 5 million in 2006. It seems to have legitimate work with actual duties for the position. What do I ask for RFE?
A: Contracts showing the described duties & the respective work location and covering the requested employment period or one year whatever is less.

Optometrists –
Q: The petitioner has submitted exam results from the National Board of Examiners…Does this suffice, or do they need a license? (2nd ed. 4/13/2007)
A: Each state requires a license to practice Optometry. Each state decides which methods it will use to issue licenses. The National Board of Examiners gives an examination that is wholly, or in part, incorporated into the licensing process. Some states just go by the exam results, some take part or all of the exam results and combine them with other additional oral, written, or practical exams, or exams in specific topics, such as law or pharmacology. Even though the alien passed the exam, that test is just one step in the whole state licensing process, so exam results alone are not sufficient evidence of licensure.

Architects –
Q: Do architects need licenses? (3rd Ed. 4/16/2007)
A: As with engineers, it depends on the duties of the architect and who they will be working for/under. If the architect is working directly for the public, they either need a license, or depending on the circumstances/state they are working in, need to be working under a licensed architect that can sign off on their work. Look at the individual state requirements. As a rule, however, licenses for architects are not required when the duties do not include design work but do require knowledge of architecture, urban planning or geography.

Acupuncturists –
Q: Do licensed acupuncturists typically qualify as a specialty occupation? (4th ed. 4/17/2007)
A: As with certain other occupations, the officer will need to see what the licensing requirements are for each state, to determine whether the position qualifies as a specialty occupation. In California, for example, in order to obtain a license to practice acupuncture, the state requires a Master's Degree, making it a specialty occupation. Most states require at least a two year program at a school that teaches Traditional Chinese Medicine, and many of these require a bachelor's degree (in any subject) to qualify for the program.

Private school teacher –
Q: Do private school teachers require licenses? (10th Ed. 5/1/2007)
A: Private schools do not require licensing through the state/area. They do, however, need to demonstrate that the position is a specialty occupation – Private schools are not comparable to public schools, as far as specialty occupation qualifications go. The licensing requirement covers the industry standards prong as far as public schools go, but does not cover private school teachers as they are not required to obtain a license. Without the licensing requirement, they can

and often do have difficulty in proving that the position is, indeed, a specialty occupation. The OOH covers public school teachers only. It does mention private school teachers, but only to say that there are vast variations as to the requirements that each individual private school has for their teaching staff. They will have to go through prongs 3 or 4…

Q: Are Montessori Teachers a specialty occupation? Do they require a license? (5th ed. 4/18/2007)
A: The officer will need to make the determination on whether the position is actually that of a teacher, whether the school requires all teachers to have a bachelor's as a requirement, etc. Is this a school that is providing an educational curriculum with lesson plans, etc. or is this a day care provider. A good way to check on some or all of this information, besides the case itself, is to do a search on the Internet. As far as licensing is concerned, generally Montessori teachers do not require state-issued licenses or credentials to teach, because Montessori's are private schools and therefore not subject to the licensing/credentialing requirements.

Medical Workers
Q: Do psychiatric residents require a license? (6th Ed. 4/19/2007)
A: Psychiatry is a field of medicine and psychiatrists are medical doctors. Like any other resident doctor profession, the beneficiary has to be licensed, or if allowed in the state of intended employment, has to be working in a licensed facility/hospital and/or under a licensed physician's supervision. In New York State, for example, residents are not required to have a license, as long as they are working for a licensed facility.

Licensing vs. Certification (Visa Screen)
Q: What is the difference between licensure and certification? (2nd ed. 4/13/2007)
A: Licensing is a requirement for the approval of the petition. It is a classification issue. Essentially, there are three scenarios that the officer may encounter…
1 - Initially the alien may have a temporary or permanent license from the state of intended employment; or
2 - The state may allow the alien to work under the supervision of a licensed professional; or
3 – The alien will submit a letter from the state indicating that a permanent or temporary license will be issued once the alien enters the U.S. or after approval by USCIS.

Certification is an admissibility issue. Therefore, this is only an issue on COS or EOS cases. AmCon cases and POE/PFI cases are resolved at the visa issuance and/or admission to the U.S.

Resources for Licensure Requirements
Q: The petitioner claims the beneficiary does not have to meet any exam or license requirements since the proffered position "physician" would be working on internet site. Is this correct?
A: As a physician, the beneficiary must comply with licensing and examination requirements of INA 212(j)(2)(A). The petitioner is not a research or nonprofit organization eligible to exempt a physician from the 212(j) rules.

Q: Where do I find out whether occupations require licensing? (2nd ed. 4/13/2007) ***revised*** (12th Ed. 3/31/2008)
A: The Occupational Outlook Handbook (OOH) gives general guidance in this area. A search of the internet utilizing a search engine such as Google or Yahoo using "License requirements for (occupation)" as the search parameters will generally give you several sites that will either give you general information for all states or state-specific information.

Q: At the time of adjudication, alien's permanent license was expired for a year. If otherwise approvable, should we grant the extension for 3 years as requested or 1 year?
A: Since the license is a permanent one, the fact that it is expired is not relevant to the decision. However, the officer may want to check online sources to make sure the respective permanent license was not revoked before the requested 3 years extension is granted. (15th Ed.)

Q: The petition was filed for the beneficiary with 1 year training level medical license to work for the internal medical residency program in PA area. How many years do I grant the beneficiary for extension?
A: One year due to his/her training license because the beneficiary does not hold a permanent license.

Q: The petition was filed for the position as a resident physician in California. The attorney argued that the beneficiary with a Texas medical license should be granted for 3-year extension since it is just a matter of time for the beneficiary to get his/her CA license with the license & experience he/she has now. Is it true?
A: No. Unless the petitioner provides a copy of the beneficiary's CA medical license, the beneficiary is not qualified to practice medicine in California and cannot immediately engage in his profession.

Q: The petition was filed for the position as a physician resident in pathology in NY area. The beneficiary has not completed #3 exam of USMLE. The attorney argued that the beneficiary does not need a state medical license since he/she won't have direct contact with patients. Is he right?
A: No. As foreign medical graduates, they must complete all exams of USMLE in order to receive graduate medical education or training in the United States. See INA 212(j)(1)(B). Since the beneficiary is not coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in US to teach or conduct research, or both, he/she is not exempt from all the required Federation licensing examination even he/she won't perform direct patient care, to qualify as a H1B. See INA 212(j)(2)(A). The beneficiary apparently is not an international renown physician to be qualified under 8 CFR 214.2(h)(4)(viii), either.

Q: When do we need the license for the position as a civil engineer?
A: If the petitioner is a civil engineering firm specializing in civil engineering project development or research, it must submit evidence showing that the beneficiary has required state civil engineer license to practice the profession or he/she would be supervised by a licensed civil engineer within the company. If the petitioner is a construction company assuming the duties require a civil engineer to perform, he/she must possess state civil engineer license or be supervised by an engineer with such license with-in the company. If the duties described by the construction company are unrelated to those duties of a civil engineer, then the license is not required. However, then examine the duties carefully to make sure them qualified the position (not the job title) as a specialty occupation.

Q: Do law clerks require license?
A: It depends on the claimed duties provided by the petitioner. If a law clerk performs the duties similar to those of a lawyer, he/she must be licensed to fully perform the occupation. Limiting the duties of the position will not exempt the alien from a license. At issue is the occupation not the duties. If the position requires a law degree to perform, then the occupation is law and the alien is required to be licensed. However, if the occupation is that of a law clerk, then whether the position is qualified as a specialty occupation may be in question. See 8 CFR 214.2(h)(4)(v). (14th Ed.)

Import/Export Companies & Iran Sanctions

Q: How do I handle petitions that that are Import/Export companies involving Iranians or sensitive technology and/or services? (6th Ed. 4/19/2007)

A: If you have a case in which a petitioner's business is or relates to the import/export industry, in which the petitioner is linked in any way to Iran OR whose business relates to Sensitive Technology goods or services, the Importer/Exporter and possibly the beneficiary, depending on the position they are petitioning for, is required to be licensed by the Department of Treasury's Export Control Agency. If there is no evidence of this in the file, RFE for the license or proof that they do not need a license.

For more information, take a look at the information in the Iran folder – the link is: O:\ADJ_div\ I-129\Reference Material\Iran

LCA

Q: The submitted LCA was issued in error by DOL during the petitioner's disbarment period due to violations. What should the officer do about it?

A: Deny it because of the invalid LCA. The said LCA was issued during the period when the petitioner was barred for DOL violations. Therefore, the LCA is invalid even if the petitioner was subsequently became active at the time of filing the petition.

Q: The job title "business development specialist" is listed on the petition but the industrial code on the submitted LCA is "030", computer industry with the same job code. Do they have to be consistent?

A: If job code is consistent with the duties, it is OK. DOL adjudicates on job code, not title just as CIS adjudicates on duties, not title.

Q: Does the LCA need to be certified prior to filing? (2nd ed. 4/13/2007)

A: The ETA-9035 (LCA) must be approved prior to filing, however, for some cases approved in March the DOL website was not allowing the petitioner to print the certification. There is an RFE for this issue in O:Common.

Q: A petition was filed for EOS by the same employer with no change. The submitted LCA indicates the work locations are at Greensboro, NC and Chicago, IL. However, the alien's address is located in Seattle, WA. Should a RFE be sent for this issue?

A: It depends on the alien's status. If at the time of adjudication, the alien's current H1B status is still valid, then RFE for explanation of discrepancy and a new LCA, which may resolve the issue. However, if the alien's H1B status has expired or will expire shortly; the petition should be denied since the LCA does not cover all work locations. Unlike the first scenario, the petitioner would not be able to secure a new LCA since DOL does not issue backdated LCAs. (15th Ed.)

Q: The job title listed on the petition is development analyst and duties described on the petition are marketing duties but the occupation code shown on the LCA is for system analyst. What should do I do?

A: If the start date listed on the petition has passed, deny the petition because the submitted LCA is not for the position shown on that document. If it is a future start date, RFE may be issued for explanation of discrepancy and a new LCA.

H3

Q: Continued from the above question, if the beneficiary has an IBIS hit due to the intention of abandoning his/her foreign residency, what should I do?
A: The intention of abandoning foreign residency is an issue for H3 petition, but not for H1B petition. Therefore, issue a decision for the H3 first.

Q: The alien, as an F-1 Student, was recently approved for H3 Status, and is now being petitioned for as an H1B…what should I do with the H1B? (3rd Ed. 4/16/2007)
A: Pull the H3 approval case and take a look at it. If the petitioning company indicates that the alien is required to have the H3 training to do the duties of the petition, then the applicant does not qualify for the H1B at the time of filing because they did not have this training. If, however, the H3 training is valid training but is not requisite for the position applied for on the H1B petition, then the adjudicator can continue adjudicating the petition.

OTHER NONIMMIGRANT CLASSIFICATIONS

L1B

Q: Can a computer consulting company qualify as an L1B petitioner? (11th Ed. 5/18/2007)
A: An L1B cannot work for or at a client as a "an arrangement to provide labor for hire" like an H1B. However, an L1B can work for a client company ONLY if the work involves bona fide L1B specialized knowledge and is in connection with a product or service of specialized knowledge that is offered by the L petitioner.
Additionally, the supervision and control must lie with the L petitioner throughout the time the L1B works at the client company. The client company supervision can provide input, guidance and feedback as it relates to the benefit of the client company, but cannot control of the work in regards to directed tasks and activities. This control must remain with the L petitioner. The contract(s) must show this control and work being PRINCIPALLY related to the specialized knowledge or service provided by the petitioner. If it tangentially (just touches on or is remotely related) to the petitioner's specialized knowledge, this is not enough.

Multiple Beneficiaries

Q: I have a I-129 petition with multiple beneficiaries – but the petitioner did not submit "attachment 1" (page 17 of the I-129). Instead the petitioner included a typed written list of the additional beneficiaries to be included on the petition. Is this acceptable? The petition is otherwise approvable. (10th Ed. 5/1/2007)
A: As long as we have all the required information, you can accept it.

H2B Returning Workers

Q: What is the process followed on returning workers? Do I need to check SQ94 on each beneficiary?- (9th Ed. 4/25/2007) ***Revised*** (12th Ed. 3/31/2008)
A: The returning worker provisions have now sunsetted.

Q: I am working on an H2b petition where the dates being requested exceed the three year limit for one beneficiary. The remaining beneficiaries qualify for the entire period of intended employment. Do we assign a shorter validity period to one beneficiary (up to the 3 year limit)? Also, can you tell me what the proper annotation is for returning workers? (10th Ed. 5/1/2007)
A: R is the correct annotation. Also mark the top middle of the petition with "R", even if there is only one returning worker out of xxxx number. 8CFR 214.2(h)(2)(ii) on multiple H2b petitions, the beneficiaries must be eligible "for the same period of time." Therefore, the officer can either deny one or grant all for the same period of time.

H3

Q: The petitioner filed I-129 H3 petition and I-129 H1B Cap for the same beneficiary. What do I do?
A: To qualify as an H-3 the employer must establish that the training program is not for the purposes of staffing the US operation. The subsequent actions of this employer in this case show to the contrary. Based upon these actions an ITD on the H-3 would be appropriate. See 8 CFR 214.2(h)(7)(iii)(E) & (F). However, if there is a bridge issue for H1B petition, proceed with the H3 adjudication, first.

Q NonImmigrants–
Q: How do we process the following scenario? On a multiple beneficiary application, Alien A is approved and listed on the approval notice. At the consulate, Alien B is substituted for Alien A. After Alien B's admission to the U.S. as a Q-1, a request is submitted to withdraw Alien B and substitute him with Alien C...How do we process this in CLAIMS? (4th ed. 4/17/2007)
A: Add Alien B and C to CLAIMS. In the split decision screen, update Alien A and B as denial, then approve Alien C in the split decision screen.

Q: The Petitioner submitted a letter to withdraw a beneficiary of a Q-1 petition. The regulations do not address this particular issue. The beneficiary they are withdrawing was substituted at the consulate, therefore, this name is not on the approval notice. (11th ed. 3/31/2008) ***Revised*** (12th Ed. 3/31/2008)
A: According to the regulation an automatic revocation does not require Service action if the qualifying business goes out of business, files a written withdrawal of the petition or terminates the approved international cultural exchange program prior to its expiration date. **None of these apply in this case.** A revocation on notice requires an ITR when the international visitor is no longer employed by the petitioner (there are other reasons). If the alien is outside of the US, the regulations require notification of the AMCON or POE **not** CIS. See 8 CFR 214.2(Q)(6). Thus, no action is required.

CAP-GAP Relief Information (F-1 to H-1B) (The interim final rule effective April 8, 2008 expands cap-gap relief for ALL F-1 students with pending H-1B petitions.) (13th ed. 4/16/2008)

Q: What does this mean to officers adjudicating H-1B cap cases?

A: Prior to this interim rule, F-1 students who are beneficiaries of approved H-1B petitions but whose period of authorized stay (including authorized period of OPT + 60-day departure preparation period) expires before October 1st would have a gap in authorized stay and employment. Therefore, the Service would issue a split decision and order the beneficiary to leave the US, obtain the H1B visa abroad and return at the time the H1B status becomes effective. With the interim rule, the authorized period of stay is extended for ALL F-1 students* who have a properly filed H-1B petition and change of status request filed under the cap pending with USCIS. If the petition is approved, the F-1 student will have an extension that will allow them to remain in the U.S. until the requested start date indicated on the H-1B petition takes effect. *The student beneficiary must be in a valid F-1 status at the time of filing the H-1B petition.

Q: What if the petitioner requested consular notification even if the evidence demonstrates that the F-1 student is eligible to change status in the U.S.?

A: If the petitioner requested consular notification as indicated on Page 1 Part 2 #5a of Form I-129, the adjudicating officer will assess the beneficiary's eligibility for a change of status. If the beneficiary is eligible to continue in F-1 status until October 1, 2008 and no request has been received from the petitioner, annotate on the side of the petition (in red) "COS eligible". However, adjudication must be made as "consulate notification" unless otherwise requested by the petitioner.

Q: What if there is an I-539 COS filed for the same H1B beneficiary?

A: In anticipation to close the "gap", some applicants file an I-539 COS from F-1 to B-2. Adjudicating officers are responsible to check the system for any pending cap-related cases. It has been CSC's standard to deny any COS from an F-1 to B-2 because the applicant's ultimate intention is to remain in the U.S. as a nonimmigrant worker.

Q: Is USCIS giving the petitioners opportunity to change their original request for consular notification to a change of status without filing an amended petition?

A: Yes, Service Centers are currently in the process of setting up email addresses so that the petitioners can notify us that they want a change of status rather than consular notification. A USCIS Update will also be posted once the email addresses for both CSC and VSC are set up.

- Premium cases: The USCIS Update will instruct PP petitioners to communicate to us via a designated PP e-mail address once they get the e-mail receipt from us with the receipt number. The file will be flagged to indicate that change of status eligibility has been assessed.
    - If we have not yet adjudicated the case, and the beneficiary is eligible for change of status, the approval notice will indicate H-1B and change of status approval.
    - If we have already adjudicated the case, it will be pulled and an approval notice indicating change of status will be issued. This will be greatly facilitated by the fact that we will have already looked at change of status eligibility while reviewing the I-129 (so we don't have to go back and adjudicate just the change of status portion as it will have been "pre-adjudicated".)
- Non Premium cases: The USCIS Update will instruct non PP petitioners to communicate via designated e-mail address once they get their receipt notice in the mail. We will urge them to do this within 30 days of receiving the receipt notice. Since we have until 10/1 and these cases will be processed after we have worked the PP cases, the likelihood of having made an adjudication before we get the c/s request from the petitioner is lessened. At any rate, if we have already adjudicated the case, the change of status eligibility will already have been noted in the file.

What is new for F-1 students? (13th ed. 4/17/2008)

Effective April 8, 2008, Interim Regulations involving student were published. These regulations both change and add provisions to provide relief for graduating and former students in the areas of maintaining status and OPT.

Changes to Current Regulations:

- F-1 students (and their F-2 dependents) status is automatically extended to 10-01-08, if the F-1 is the beneficiary of a timely filed pending or approved H-1b petition with request for a change of status.

- OPT can now be filed 90 days before or 60 days after the completion of studies but within the 30 days of the DSO's recommendation.

- During the initial 12- months of OPT, the F-1 can have up to 90 days of unemployment; Otherwise the F-1 is not maintaining status.

New Provisions:

- Provides for an extension of 17 months OPT for STEMS students, Science, Technology, Engineering & Math, for a maximum total time of 29 months.

- STEMS students are entitled to max of 120 days total of unemployment.

- Extensions must be filed with CIS prior to the expiration of the initial grant of OPT, that is while the F-1 is in valid status and with 30 days of the DSO recommendation.

- The alien may receive only one 17-month extension.

- The alien must provide the school with updated information and comply with a 6 months reporting requirement.

What is a STEM degree?

To be eligible for the 17-month OPT extension, a student must have received a degree included in the STEM Designated Degree Program List. This list sets forth eligible courses of study according to Classification of Instructional Programs (CIP) codes developed by the U.S. Department of Education's National Center for Education Statistics (NCES). The STEM Designated Degree Program List includes the following courses of study:

- o Computer Science
- o Actuarial Science
- o Engineering
- o Engineering Technologies
- o Science Technologies
- o Biological and Biomedical Sciences
- o Mathematics and Statistics
- o Military Technologies
- o Physical Sciences
- o Medical Scientist

The STEM degree list is included in the preamble to the interim final rule and will be posted on the ICE website.

Note that to be eligible for an OPT extension the student must currently be in an approved post-completion OPT period based on a designated STEM degree. Thus, for example, a student with an undergraduate degree in a designated STEM field, but currently in OPT based on a subsequent MBA degree, would not be eligible for an OPT extension.

What are the eligibility requirements for the 17-month extension of post-completion OPT?

- The student must have a bachelor's, master's, or doctorate degree included in the STEM Designated Degree Program List.
- The student must currently be in an approved post-completion OPT period based on a designated STEM degree.
- The student's employer must be enrolled in E-Verify.
- The student must apply on time (i.e., before the current post-completion OPT expires).

ARCHIVES

(a) Answer: In 2004, Congress established an exception to the H-1B cap for aliens who 'earned' a Master's degree or higher degree from a United States academic institution. Consequently, the regulation cite that provides for a bachelor's degree plus at least five years of progressively responsible experience does not apply for this exception. In addition, all requirements for the U.S. Master's degree must be completed at the time of filing of the petition and not a date in the future. Transcripts of study evidencing completion of the requirements for the Master's degree are acceptable in lieu of the degree certificate or diploma; a letter from the dean of the alien's college without the transcript of study will not suffice.

If all requirements for the Master's degree have not been met, the alien would not be eligible for this exception. The denial shell can be located at O:/Common/ADJ_div/I-129/_H1b1/I-292 Denials/Petitioner Issues/Cap Issue/H-1B Cap FY-2008, No Adv Degree Exemption-Not US Degree.doc.

Section 248 of the INA and parts 214 and 248 of 8 CFR allow for the change of an alien's nonimmigrant classification to another nonimmigrant classification provided the alien is not within one of the classifications precluded from changing status. The alien must continue to maintain their current classification to the date of intended employment. If the alien is not maintaining their current classification to the date of intended employment, the petition may be approved while the change of status request must be denied (split decision).

(b) Answer: An F-1 academic student is admitted or changed to F-1 while in the U.S. for duration of status (D/S). Duration of status is defined as the time during which the student is pursuing a full course of study or engaged in authorized optional practical training following the completion of studies. The student is considered to be maintaining status if he or she is making normal progress toward completing their course of study. An F-1 student who has completed a course of study and any authorized practical training following completion of studies will be allowed an additional 60-day period to prepare for departure from the U.S. or file a petition for a change of status to another nonimmigrant classification.

Not all F-1 students are permitted the 60-day departure period. A student authorized by the Designated School Official (DSO) to withdraw from classes will be allowed a 15-day departure period (SEVIS indicates this status as 'Withdraw'). A student who fails to maintain a full course of study without the approval of the DSO or otherwise fails to maintain status is not eligible for

any additional departure period (SEVIS indicates this status as 'Failure to Appear' or 'No Show' for example).

A student may be authorized a maximum of 12 months of optional practical training directly related to the student's major area of study. A student must apply for OPT on Form I-765 and may not begin employment until the date indicated on the EAD card. The student may be granted authorization for employment after completion of all course requirements for the Master's degree (excluding the thesis or thesis equivalent). OPT must be requested through the DSO and the filing of an I-765 prior to the completion of all course requirements for the degree or prior to the completion of the course of study. A student must complete all practical training within a 14-month period following the completion of all course requirements or the completion of study. After completion of OPT, the student is permitted 60 days to depart or file a petition for a change of status.

If the F-1 student's authorized employment and 60-day departure period do not extend to the intended start date of employment (October 1, 2007), the petition may be approved but the change of status request must be denied (split decision).

Please note that the paragraphs above pertain only to F-1 students; issues and time periods for M-1 and J-1 students are not the same.

(c)

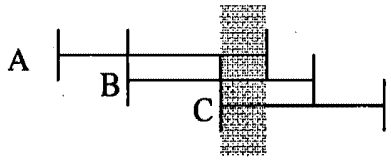
If the copy of the NOL is submitted with the I-129 and it is dated on or after October 10, 2006, an officer can check the lists found at http://vsc.cis.dhs.gov/VSC_DOS_612.htm and click on Vermont Service Center "DOS Approvals" or "DOS Denials" to locate the EAC receipt number. Once the officer has the receipt number, he/she can check CLAIMS (National) for the decision. If the case is not worked yet and it needs to be adjudicated, an appointed POC can email Michael J. Paul, Supervisory Adjudications Officer, at the VSC with the information (Name as it appears on the letter, DOB, and COB). Michael can also be contacted at phone number 802-527-4776.

The officer should also do a name, DOB and COB search in CLAIMS LAN and CLAIMS Mainframe first to verify if case was possibly adjudicated here at the CSC or at another service. Even though, the I-612 went electronic and paperless on October 10, there are still a few that were in the pipeline and came in through regular mail.

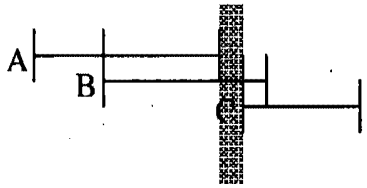
If the NOL letter is dated prior to 10/10/2006, then we should send out an RFE asking that the case be reconstructed. The applicant would need to submit the NOL letter and biographic data sheet (DS-3035) along with all supporting documentation. These requests can be sent to Marisol De Los Santos, so that someone on her team can adjudicate it for the officer needing the waiver.

(d)

Example: Employer A files a petition for a beneficiary for 3 years as H1B and is approved. Then the beneficiary finds a job with Employer B. Employer B files a petition for the beneficiary – the beneficiary can go to work for company B as soon as the petition has been filed. While the petition for Company B is pending, the beneficiary finds a job with Company C. The beneficiary can go work for Company C as soon as C has filed the petition. Do not let Premium processing Company C cases precede Company B case decision. The diagram below shows how the overlap or non-overlap of dates determines whether the beneficiary has maintained status. The lines of A, B, and C represent the span of time granted/requested on the H1B petitions for each company.



In this case, because approval of Company A overlapped Company C, beneficiary has maintained status if/when petition for Company B is denied or revoked.



In this case, because approval of Company A did not overlap Company C, beneficiary has not maintained status if/when petition for Company B is denied or revoked. Split decision.

(e)

The adjudicator will need to look at a couple items on the alien's transcript and determine how the alien entered the program and with what degree, as well as where he or she is in the doctoral program. The first page should indicate the requirements to enter the doctoral program. Some programs require a Master's Degree and some require only a Bachelor's Degree. The transcript should show what the alien used to enter the program (type of degree and place of issuance). If the basis for entry into the doctoral program is a U.S. based Master's Degree, then the alien has the requisite degree needed for the Advanced degree cap. If not, then further review of the transcript is required. If the alien entered using the program using a foreign master's degree, then in order to qualify for the advanced degree cap they must have completed ALL requirements for conference of the degree (coursework, thesis/dissertation, and orals). If he or she has not completed this, then he or she is not eligible. If however the alien entered the program with a bachelor's degree (foreign or U.S.), and the coursework is completed, then we can, for immigration quota purposes ONLY, consider him or her as having received a U.S. Master's Degree. To determine whether the coursework is complete, review the classes listed in the transcript. If the latest classes are all listed as "thesis research" or "dissertation research," and there are no coursework or instructor-led classes, then the alien has completed the required coursework. The reason for this is that for those entering doctoral programs with a Bachelor's degree who finish all coursework, but fail at the thesis/dissertation and/or the orals, he or she will be given, by default, a Master's degree. NOTE, however, that if the position that the alien is being hired for requires a master's degree or higher to perform the duties, the alien must have all requirements for the requisite degree met OR, if a master's degree is required then look at equivalency.

(f)

First, look at the petition – on the first page, the petitioner should list the prior petition in Section 2, question 3 & 4. Type the previous petition # into CLAIMS MF.

When you look at the previous case in CLAIMS MF, you need to look at three things –

```
FSXMIPT1                  CLAIMS MAINFRAME SYSTEM                    04/19/2007
                        PETITION UPDATE PROCESSING                   16:48
    MODE: L                                                          WACSIP02
    FORM: I129      RECEIPT NBR [redacted]                    OWNED BY:  SRC
  PART 2: B   PART 3: C   RECEIVED DATE: 09/15/2005
 REF NBR:                 APPEALED FORM: 334200   ASSOC RCPT NBR: [redacted]
```

(b)(6)

Under the form type and Number, you will see Part 2, Part 3, and to the right, the Assoc Rcpt Nbr.

"Part 2" corresponds to the Part 2, question 2 of the I-129.

A – New employment

B – Continuation of same employment

C – Change in previously approved employment
D – Concurrent employment.
E – Change of employment.
F – Amended petition.

"Part 3" corresponds to Part 2, question 5 of the I-129.
A – Consular Notification
B – Change of Status Requested
C – Extend the stay of person who holds the status
D – Amend the stay of person who holds the status

Assoc Rcpt Nbr – is the petition filed previous to the petition on the screen.

Looking at the above example, the beneficiary has a petition prior to this one - - keep following the associated receipt numbers back until you see A in the Part 2 field, and A or B in Part 3 field. If Part 3 is an A, you will then need to go to SQ94 and run a Name/DOB search to see when the beneficiary's 1st entry as an H1B occurred – it should be, but not always is, a date within a couple months of the approval of the I-129. If Part 3 is a B, then look at the validity dates of the petition – the start date is the beneficiary's first day in H1B status.

(g)
The number of petitions, which can be an indicator, does not necessarily indicate that there is a concern on the number of employees.
You need to keep in mind a few factors –
1 – Some of the beneficiaries filed for could count for more than one petition – If the company originally filed for them in 2003 and later filed an extension, then the beneficiary would account for 2 of the files…if they have an I-140 pending, that would be a 3rd. Also, as this is 2007, you will only look at those petitions filed in 2004 or later – anyone earlier than that either was extended on a later petition OR is no longer at the company…
2 – Attrition – especially in the IT industry, employees move around quite a bit – some of the beneficiaries may no longer be at the company…
3 – I-129 approval is sometimes a lure to get someone to come work for a company…When a person is looking for a job, they generally send their resume to several companies – those companies compete, in part, for that person by filing an I-129. The approval of the I-129 can be an incentive for the person to choose that particular company…If there are 5 companies competing for the person, 4 companies may have approved petitions for employees who never entered on duty. So, some of the beneficiaries of the petitions you see may never even have started work for the employer…
A general guideline when we become concerned is the 5:1 ratio – 5 petitions to 1 employee… This is not concrete by any means, and if there are more indicators of fraud then the 5:1 ratio may be more or less…
So if you had a company of 61 employees and you saw that they had 305 petitions, this would be more of an indicator of fraud…

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Tuesday, May 13, 2008 5:20 PM
To: Dyson, Howard E; Goto, Blake K; Nicholson, Roya Z; Rangaswamy, Jay ; Taylor, Shawn M; Torres, Lory C; Wolcott, Rachel A; DeJulius, Robert W (rwdejuli@fins3.dhs.gov); Eberling, George (ggeberli@fins3.dhs.gov)
Subject: FW: ROLLING FAQs 15th ed 051308

FYI

From: Agnelly, Mary C
Sent: Tuesday, May 13, 2008 10:57 AM
To: Brickett Sr, Stephen M; Fierro, Joseph ; Goodman, Lubirda L; Gooselaw, Kurt G; Johnson, Ron E; Prince, Rose M
Cc: Wang, Yamei
Subject: ROLLING FAQs 15th ed 051308

Below is the 15th Edition of the Rolling FAQ. Comments and changes need to be made by 4:30 for pulication onWed 8 am.

ROLLING FAQ's.....Edition #15

Questions answered on H1B issues

EOS Questions

Grace Period

Q: Is there a grace period for filing after the authorized period of stay expires (as shown on the I-94)? (6th Ed. 4/19/2007) (9th Ed. 4/25/2007) ***Corrected****

A: There is a 10-day period after the authorized stay expires on H1B nonimmigrants for the purpose of allowing the alien to depart – an extension can be filed during the 10-day grace period, but it is still considered an untimely filing. An untimely filing is one filed after the previous status has expired. The 10-day grace period does not change this. Also, remember that a petition filed the day after status expires is a timely filing: For example, if status expires on 4/24/07 and the extension is received on 4/25/07, this is considered a timely filing. If the extension is received on 4/26/07 or thereafter, it would be considered untimely.

Finally, a late filing can be excused at the discretion of the adjudicator if the late filing was beyond the control of the petitioner or beneficiary. Beyond the control does not mean that the petitioner or the representing attorney forgot to file timely. That is within the petitioner's control. Examples of beyond the petitioner/beneficiary control would be if a petitioner was in an accident while attempting to deliver the petition to the post office and was hospitalized for a period of time and then mailed the file when he was able and it was received late. Another may be an attorney assured the petitioner that the file would be filed timely, but the attorney filed it late and did not inform the petitioner, but attempted to deceive the petitioner that the file was timely. Normally, documented evidence needs to be presented by the petitioner to show the late filing was beyond the petitioner's control. Evidence could be medical reports or evidence that the petitioner has filed a complaint/law suit against the attorney who deceived the petitioner.

Filed during 10 days post expiration

Q: What should I do when the petition is filed during the 10 days after the current H1B expires? What is the start date going to be? (6th Ed. 4/19/2007) ***Amended*** (12th Ed. 3/31/2008)

A: The petitioner can file during the 10 day period after the expiration of the current H1B status granted to the alien to depart the U.S. The H1B is not authorized to work during this period. The officer will need to look at the LCA to

determine the start date – grant the start date the LCA does. If the LCA indicates a start date immediately following the end date of the current status, then that start date can be granted; if it gives a start date, for example for the 10th day after the current status expires, then that is the date they will be given. If a split decision, the start date will be the date of adjudication or a future date.

Recaptured Time

Q: Can a petitioner request recaptured time for an AC21 year? Scenario: A petitioner was requesting recaptured time for year 8 when the beneficiary was in their 9th year. (1st ed. 4/12/2007)

A: No. Recaptured time is limited to the initial years. See *Matter of IT Ascent (AAO 2006, 06-001)* AC21 time cannot be adjusted or recaptured. A request for recaptured time is a request to adjust the 6 year period, taking into account time not spent in H1B status, so that is not a request for time beyond the 6 years, but a request to complete the entire 6 years, even if it appears to go into the 7th year.(2nd ed. 4/13/2007)

Q: When can an alien recapture time?

A: Recaptured time may be requested and granted at any stage, before or after AC 21 time, but time under AC 21 can **not** be recaptured. (14th ed.)

Q: Is a new LCA required for recaptured time?

A: The Labor Condition Application must cover the entire time period requested including any recapture time. (14th ed.)

Seasonal/intermittent employment/Commuters

Q: What action do I take? The beneficiary has held previous status as an H1B over the past 5 years. A review of SQ94 shows that the beneficiary was in the U.S. only for a few months at a time for the first three years of the five – in the last two years the beneficiary was in the U.S. in H1B status for most of each year. The petitioner is now asking for another three years. Do I look at recaptured time? How much time are they eligible for? (8nd ed. 4/23/2007)

A: Seasonal/Intermittent employment (less than 6 months out of the year) and commuters are not subject to the 6 year limit. Do not start counting the 6 years until/unless the beneficiary is here for more than 6 months out of the year. In the instant case, we would not count the first three years towards the 6 year limit, as that time is not subject. We would consider the two most recent years as subject to the 6 year limit, and would be able to grant, if otherwise approvable, three years.

AC21 eligibility –

Q: A petitioner filed I-129 seeking extension beyond 6 years limitation. For AC21 104(a), do they have to qualify as of date of filing or date of adjudication?

A: As of date of filing, the alien must have an approved I-140 and visa number not available. (15th Ed.)

Q: A I-129 petition was filed for a Chinese citizen seeking 104(a) extension for 3 years. The relating I-140 was approved for Employment 2nd Preference with a priority date March 11, 2006. Upon review the attached I-539, the officer found that the alien's spouse was born in Canada and their child is a Japanese citizen. Does it affect the request of extension for 3 years?

A: Yes, under alternate chargeability rules, the visa number may be charged to country of birth of the spouse. Even though a visa number may not available for China, it is available for Canada or Japan. Therefore, the EOS would be granted only for 1 year. See INA 202(b)(2). (5-08-2008 15th Ed.)

Q: The labor certification application was approved on Jan 26, 2007 with no I-140 filing so far. What should I do with the extension?

A: Deny it under AC21 106(a) unless the I-129 was filed before Jan 12, 2008. See o:common for denial. All labor certifications approved before July 16, 2007 must now have an I-140 filed. The 180 day clock for these older approved labor certifications started on July 16, 2007 and the clock expired on January 12, 2008. Therefore, no extension will be granted without the filing of I-140 for these old labor certifications.

Q: If the I-140 used as the basis for eligibility under AC21 was denied and the petitioner filed an appeal with the AAO, can the petitioner use the I-140 to qualify for AC21? (2nd ed. 4/13/2007)

A: Yes - as long as the appeal is still pending, the I-40 is considered pending. If in checking the status of a Backlog Reduction Labor cert the officer finds that the certification has been denied, the officer must either RFE or ITD for verification of whether an appeal has been filed.

NOTE: Because of the 12/05 Aytes memo stating that an alien does not have to be in the U.S. or be in H1B status to file for AC21 benefits, an L beneficiary can get AC21 benefits when a petitioner files a COS to H1B for him. This is true even if the alien has had a mixture of H1B and L status OR if the alien has had all L status.

Examples:

1. An alien with first 3 years of H and then 3 years of L status can COS to H1B under AC21
2. An L1B alien who has used up all 5 years of L1B status can COS to H1B and get the 6th year of H1B and 2 years under AC21 if qualified to do so.
3. An L1A who has used up all 7 years of L1A status can COS to H1B under AC21.

Remember, the alien does not have to be currently in H1B status to get AC21 benefits, but must be in non-immigrants status. He cannot be out of status. An alien outside of the US who has prior H1b status is also eligible for extension under the 6 year rule (11th Ed. 5/18/2007)

Q: What if a second I-140 or I-485 has been filed? (11th Ed. 5/18/2007)
A: With rare exception, once and I-140/485 originally filed under the original labor cert. is denied, the labor cert. is dead in the water. AC21 makes it clear that GENERALLY, the labor cert can be used for AC21 benefits until a FINAL DECISION was made on the related petition/application. Once a decision is made on the I-140/485, the labor cert. is no longer valid for AC21. But please be mindful of appeals of denials that have been filed and are still pending. Also, keep in mind, if a second I-140 has been filed and is now pending for more than 365 days, it does qualify for AC21 benefits. This information will need to be verified.

Q: For FY 2009 cases, are DOL backlog reductions or local filing letters still valid?
A: Letters from local, state DOL offices or the Backlog Reduction Centers are no longer sufficient by themselves to establish that eligibility under AC 21 Section 106. ~~ON~~ DOL has announced on its website that the backlog reduction centers are closed and that all cases are completed as of Oct 1, 2007. Subsequently, DOL has admitted that there is handful of cases not completed but the number is less than 10. Thus, action on the labor certification request should have been completed. The officer now needs evidence of the most recent action by DOL. If the labor certification is not current and no appeal was filed, the alien is no longer eligible for AC 21 106 benefits. If the labor certificate was granted, then the petitioner has 180 days after approval or Jan 12, 2008, whichever is later, to file an I-140. Failure to file the I-140 timely automatically invalidates the labor certification and thus the alien is not longer eligible for benefits under AC 21 Section 106. (14th ed.)

Q: A letter from DOL indicated the ETA was closed due to late filing or incomplete. In response to my RFE, the petitioner submitted a Backlog printout of the ETA which has a TR in the processing Type. What does TR stand for? (11th ed. 5/18/2007)
A: TR identifies the case as a Traditional Recruitment case for the backlog reduction group at the Department of Labor.

Q: The beneficiary has a pending I-485 as a derivative. The beneficiary wants to remain in H-1B status and request a 3-year extension. Do I need to find out what category the beneficiary has filed for on the I-485 before granting one year or three years? (11th Ed. 5/18/2007)
A: Since the I-485 is based upon the alien's derivative status, not as the "beneficiary of a petition filed under 204(a)", the alien is not eligible in his or her own right for an H1B extension on the basis of SEC 104 of AC 21. To be eligible for 106, the beneficiary needs to have a labor certification and/or I-140 filed in his or her behalf. See the Dec 2005 memo. Thus, being a derivative does not establish eligibility under AC 21 as an H1b.

Q: The status on the Labor Cert shows Denial of RIR (Reduction in Recruitment)...does that mean the Labor Certification has been denied? (2nd ed. 4/13/2007)
A: No, this is not a final decision on the Labor Certification.

Q: When should the officer request an update on the pendancy on the Labor Certification? How old is too old? (2nd ed. 4/13/2007) ***amended*** (12th ed. 3/31/2008)