**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.

***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. (15th Ed.)

**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. (15th Ed.)

**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:** 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:** 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).

***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:** 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? (11th ed. 5/18/2007)

**A:** Per HQ, dismiss the untimely motion and refund the ACWIA fee.

Q: 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?

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.)

***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~~send to the Consulate~~ when the petitioner has submitted only one copy of the petition and it needs to go for consular processing? ~~(8nd ed. 4/23/2007)~~
**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.)
~~A: A copy of the petition itself, the LCA and all evidence used to make the decision (the employment letter, the transcripts and diploma, etc.) should be sent to the Consulate. Evidence submitted that was not relevant to the decision (e.g. Annual Reports issued to stockholders of major corporations).~~

**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:** 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. (15th Ed.)

***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)

[redacted]

*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.

***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:** 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)

***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...

***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: 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:** 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:** 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 Approval*

**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.

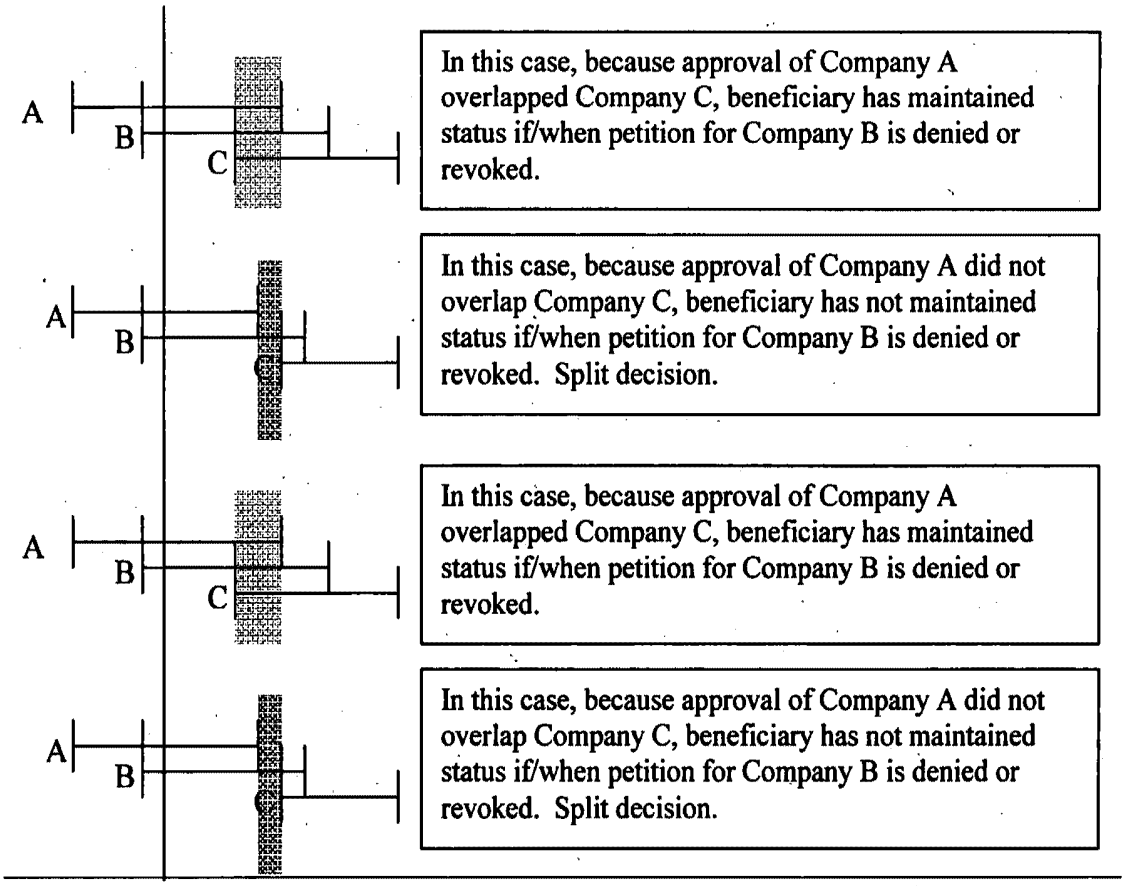
The officer should also do a name, DOB and COB search in CLAIMS LAN and CLAIMS Mainframe first to verify if case was possibly adjudicated here at the CSC or at another service. Even though, the I-612 went electronic and paperless on October 10, there are still a few that were in the pipeline and came 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.



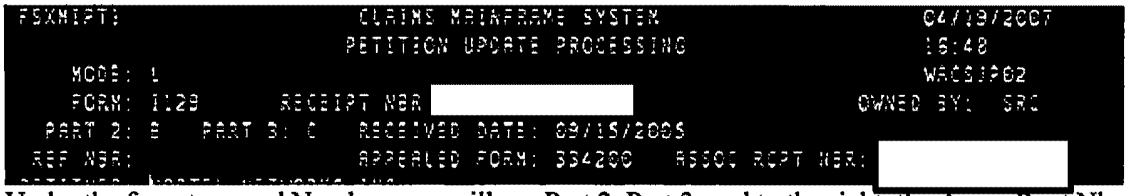

(e)

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 –




(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:** Velarde, Barbara Q
**Sent:** Friday, August 13, 2010 1:04 PM
**To:** Gooselaw, Kurt G; Chau, Anna K; Fierro, Joseph; Nguyen, Carolyn Q; McMahon, Gerald K; Johnson, Bobbie L; Young, Claudia F; Sweeney, Shelly A; Renaud, Daniel M
**Cc:** Gregg, Bret S
**Subject:** FW: Activity in Case 1:10-cv-00941-GK BROADGATE INC. et al v. UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES et al Memorandum & Opinion
**Attachments:** order dismissing case.pdf; Court's Memorandum Opinion.pdf

**Importance:** High

FYI... great news

---

**From:** Forney, Geoff (CIV) [mailto:Geoff.Forney@usdoj.gov]
**Sent:** Friday, August 13, 2010 1:19 PM
**To:** Beck, Lee; Carr, Prudence; Salem, Claudia S; Jeffries, Lina; Dalal-Dheini, Sharvari P; Kleczek, Marguerite P; Belgrade, Michael J; Symons, Craig M; Rhew, Perry J
**Subject:** FW: Activity in Case 1:10-cv-00941-GK BROADGATE INC. et al v. UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES et al Memorandum & Opinion
**Importance:** High

We won. The H-1B memo stands. The court held that the memo is simply a policy statement with no legally binding effect, and therefore does not constitute final agency action.

The court appears to have blurred the two tests for policy statements and interpretive rules, but we won, so who can complain.

Thanks everyone for all your help on this.

Of course, plaintiffs have sixty days to appeal, so we'll wait to see if the battle continues.

Geoff Forney
[redacted] (b)(6)

---

**From:** DCD_ECFNotice@dcd.uscourts.gov [mailto:DCD_ECFNotice@dcd.uscourts.gov]
**Sent:** Friday, August 13, 2010 12:57 PM
**To:** DCD_ECFNotice@dcd.uscourts.gov
**Subject:** Activity in Case 1:10-cv-00941-GK BROADGATE INC. et al v. UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES et al Memorandum & Opinion

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**U.S. District Court**

**District of Columbia**

## Notice of Electronic Filing

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| **Case Name:** | BROADGATE INC. et al v. UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES et al |
| **Case Number:** | 1:10-cv-00941-GK |
| **Filer:** | |
| **Document Number:** | 15 |

**Docket Text:**
**MEMORANDUM OPINION to the Order dismissing the case with prejudice. Signed by Judge Gladys Kessler on 8/13/10. (CL, )**

**1:10-cv-00941-GK Notice has been electronically mailed to:**

Robert P. Charrow charrowr@gtlaw.com

Laura Metcoff Klaus klausl@gtlaw.com

Geoffrey Forney geoff.forney@usdoj.gov

**1:10-cv-00941-GK Notice will be delivered by other means to::**

The following document(s) are associated with this transaction:

**Document description:**Main Document
**Original filename:**suppressed
**Electronic document Stamp:**
[STAMP dcecfStamp_ID=973800458 [Date=8/13/2010] [FileNumber=2643217-0]
[7fd2b89afc94e6a158f9f5635785f0d6c1db408b45e583ec712f3d6a0ddf61faea23
cc477044763dc1f510cc14c1e550b2cfa37a9c3842d4b381c977358c4f94]]

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| **BROADGATE, INC., et al,** | : | |
| | : | |
| **Plaintiff,** | : | |
| **v.** | : | **No. 10-cv-941 (GK)** |
| | : | |
| **UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, et al,** | : | |
| | : | |
| **Defendant.** | : | |
| | : | |

**ORDER**

Plaintiffs Broadgate, Inc., Logic Planet, Inc., DVR Softek Inc., TechServe Alliance, and the American Staffing Association ("ASA") bring this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., and the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., against Defendants United States Citizenship and Immigration Services ("USCIS"), Alejandro Mayorkas, Director of USCIS, United States Department of Homeland Security, and Janet Napolitano, Secretary of Homeland Security.

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction [Dkt. No. 3]. On July 7, 2010, the parties submitted a Joint Praecipe indicating their agreement with the Court's proposal to consolidate the hearing on the motion for a preliminary injunction with a determination on the merits under Federal Rule of Civil Procedure 65(a)(2). The parties presented oral argument at a Motions Hearing held on August 5, 2010. Upon

consideration of the parties' arguments, the Motion, Opposition, Reply, and the entire record herein, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby

**ORDERED**, that this case is **dismissed with prejudice**. This is a final appealable Order subject to Federal Rule of Appellate Procedure 4. See Fed. R.App. P. 4.

/s/
Gladys Kessler
United States District Judge

August 13, 2010

Copies to: Attorneys of Record via ECF

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| **BROADGATE INC., et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **v.** | ) | **No. 09-cv-1423 (GK)** |
| | ) | |
| **UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |
| | ) | |

**MEMORANDUM OPINION**

Plaintiffs Broadgate, Inc., Logic Planet, Inc., DVR Softek Inc., TechServe Alliance, and the American Staffing Association ("ASA") bring this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., and the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., against Defendants United States Citizenship and Immigration Services ("USCIS"), Alejandro Mayorkas, Director of USCIS, United States Department of Homeland Security, and Janet Napolitano, Secretary of Homeland Security. This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction [Dkt. No. 3]. On July 7, 2010, the parties submitted a Joint Praecipe indicating their agreement with the Court's proposal to consolidate the hearing on the motion for a preliminary injunction with a determination on the merits under Federal Rule of Civil Procedure 65(a)(2). The parties presented oral argument at a Motions Hearing held on August 5, 2010. Upon consideration of the parties' arguments, the Motion, Opposition, Reply, and the entire

record herein, and for the reasons stated below, Plaintiffs' Complaint is **dismissed.**

## I. Background

Plaintiffs Broadgate, Logic Planet, and DVR are software development and information technology firms which rely on a pool of foreign citizens and permanent residents in order to meet the hiring needs of their clients. Plaintiffs TechServe and ASA are not-for-profit membership corporations that qualify as small entities under the Regulatory Flexibility Act, 5 U.S.C. § 601(6), which supply temporary employees to other businesses. Plaintiffs Broadgate, Logic Planet, and DVR are third-party employers, as are the members of Plaintiffs TechServe and ASA, and all Plaintiffs are small businesses within the meaning of § 3 of the Small Business Act, 5 U.S.C. § 601(3). Compl. ¶¶ 3-7.

Plaintiffs regularly submit petitions to Defendant USCIS for H1-B visas on behalf of the foreign employees they wish to hire. See 8 U.S.C. § 1101(a)(15)(H)(i)(b) (H-1B visa program). The H-1B visa program permits aliens to enter the United States under a visa to perform services in a "specialty occupation," which is an occupation that "requires (a) theoretical and practical application of a body of highly specialized knowledge, and (b) attainment of bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1). If approved, an H-1B visa

lasts for three years, and is renewable. 8 U.S.C. § 1184(g)(4); 8 C.F.R. §§ 214.2(h)(15)(ii)(B)(1), 214.2(h)(13)(iii)(A). While only 65,000 H-1B visas are permitted each fiscal year, 8 U.S.C. § 1184(g), USCIS has granted Plaintiffs and their members thousands of H-1B visas. See Pls.' Mot. for Preliminary Injunction [Dkt. No. 3] at 3.

In 2009, USCIS issued an immigration regulation, codified at 8 C.F.R. § 214.2, which sets forth special requirements for the admission, extension, and maintenance of status for certain "non-immigrant classes" ("Regulation"). One of the non-immigrant classes addressed is "temporary employees," which includes the foreign employees that Plaintiffs rely on in order to operate their businesses. The Regulation requires that H-1B petitions be filed by a "United States employer," defined as:

> [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.

8 C.F.R. § 214.2(h)(4)(ii). Thus, the Regulation establishes five factors, referred to as the "control test," to assess whether there is an "employer-employee relationship" sufficient to grant an H-1B visa: whether the employer hires, pays, fires, supervises, or otherwise controls the work of an employee.

On January 8, 2010, Donald Neufeld, Associate Director of Defendant USCIS, issued a memorandum ("Neufeld Memorandum" or "Memorandum") to Service Center Directors relating to USCIS's H-1B visa program. Memorandum from Donald Neufeld, Associate Director, Serv. Ctr. Operations, USCIS, to Serv. Ctr. Dirs. (Jan. 8, 2010) (Ex. A to Pls.' Mot. for Preliminary Injunction) [hereinafter "Memorandum"]. The Neufeld Memorandum purports to clarify the Regulation's control test by setting forth eleven factors that adjudicators must consider in determining whether an employer-employee relationship exists between a sponsor and a candidate for a H-1B visa program. See Memorandum at 4-5. Plaintiffs argue, however, that the Neufeld Memorandum establishes a different standard from the Regulation's control test, and therefore constitutes a new, binding rule. Because the Memorandum was not issued in accordance with the APA's procedures for agency rulemaking, Plaintiffs argue that this new "rule" must be invalidated.

Plaintiffs bring five counts in their Complaint. In Count I, Plaintiffs claim that Defendants are liable for violation of the notice and comment requirements of the APA, 5 U.S.C. §§ 553, 706. In Count II, Plaintiffs claim that Defendants violated the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., by failing to perform a Regulatory Flexibility Act Analysis before issuing the Memorandum. In Count III, Plaintiffs claim that the Neufeld

Memorandum is in excess of regulatory and statutory authority under 8 C.F.R. § 214.2(h)(4)(ii) and the APA, 5 U.S.C. §§ 706(2)(A) and (C). In Counts IV and V, Plaintiffs claim that Defendants have engaged in arbitrary and capricious rulemaking in violation of 5 U.S.C. § 706(2)(A) and (D) because the Memorandum redefines the employer-employee relationship without justification or authority and was written by Neufeld, a USCIS employee not authorized by law to issue rules.

Defendants respond that the Neufeld Memorandum is not a substantive rule setting forth a new standard, but instead a policy statement or interpretive rule that clarifies the common law background of the Regulation's control test. Defendants therefore argue that Plaintiffs' Complaint is a broad programmatic challenge to one of its general policies--namely, the agency's internal guidelines for determining an employer-employee relationship for the H-1B program--which is not entitled to judicial review under § 702 of the APA. Defendants also argue that Plaintiffs fail to state a claim under the APA in Counts I and III-V because the Memorandum does not constitute final agency action subject to judicial review under § 704 and notice and comment rulemaking under § 553. See Defs.' Opp'n at 13-26. Finally, Defendants argue that Count II fails to state a claim because the Regulatory Flexibility Act does not apply to guidance documents or interpretive statements such as the Memorandum. See 5 U.S.C. §§ 603(a), 604(a).

**II. Standard of Review**

The first requirement for judicial review under the APA is that the complaint must challenge "agency action." 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 890, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990); Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001). Programmatic challenges lacking "some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him" do not qualify as agency action, and so are not "ripe" for judicial review under the APA. Lujan, 497 U.S. at 891.

Second, the challenged agency action must be "final." 5 U.S.C. § 704 (authorizing judicial review under APA of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court"); Lujan, 497 U.S. at 882. Final agency action "must generally 'mark the consummation of the agency's decisionmaking process' and either determine 'rights or obligations' or result in 'legal consequences.'" Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 800 (D.C. Cir. 2006) (quoting Bennett v. Spear, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)) (emphasis in original). Legislative or substantive rules are, by definition, final agency

action, while interpretive rules and general policy statements are not. Id. at 805-07.

Notice and comment procedures are only required under APA § 533 for legislative rules with the force and effect of law; "interpretive rules, general statements of policy, or rules of agency organization procedure, or practice" are exempted. 5 U.S.C. § 553(b)(A) ; see also Nat'l Ass'n of Broadcasters v. FCC, 569 F.3d 416, 425-26 (D.C. Cir. 2009). Finally, the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, only applies when an agency is required to publish general notice of proposed rulemaking. 5 U.S.C. §§ 603(a), 604(a).

**III. Analysis**

First, the parties dispute whether USCIS's issuance of the Neufeld Memorandum constitutes agency action. Defendants argue that it is not, and that Plaintiffs' action is a non-justiciable programmatic challenge to USCIS's administration of the H-B1 visa program.

In RCM Technologies, Inc. v. United States Dep't of Homeland Security, 614 F.Supp.2d 39 (D.D.C. 2009), this District Court considered whether a group of employment recruiters could challenge USCIS's alleged policy requiring that foreign occupational and physical therapists possess master's degrees in order to obtain H-1B visas. Relying on Lujan, the court concluded that the plaintiffs' challenge to the alleged policy was not reviewable

under the APA. RCM Technologies, 614 F.Supp.2d at 44-45. Instead, the proper challenge would have been to a specific denial of a visa application by the agency. Id. at 45; see also Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000).

Plaintiffs seek to distinguish RCM Technologies on the ground that Defendant USCIS argues that the Neufeld Memorandum is either a policy statement or an interpretive rule. If the Court accepts the Government's argument that the Memorandum is an interpretive rule, Plaintiffs argue, then the Memorandum constitutes agency action under Lujan and RCM Technologies.[1] At this juncture the Court need not decide whether the Memorandum constitutes a policy statement or an interpretive rule because the parties have raised an equally dispositive issue: whether the Memorandum is a legislative rule, which it must be under the APA to qualify as final agency action subject to judicial review. See Center for Auto Safety, 452 F.3d at 805-07 (only agency rules that establish binding norms or agency actions that occasion legal consequences are subject to review under the APA).

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[1] Plaintiffs also seek to distinguish RCM Technologies on the ground that the parties in that case disputed whether the policy in question even existed. Pls.' Reply at 5 n.2. Because the District Court in RCM Technologies drew its conclusions regarding the action's reviewability on the assumption that the alleged policy did in fact exist, this argument is unpersuasive. 614 F.Supp.2d at 43-45.

If the Memorandum is a legislative rule, then it is final agency action under the APA subject to judicial review, and it is subject to notice and comment rulemaking under § 553. However, as just stated, if the Memorandum is an interpretive rule or general policy statement, the opposite is true: it is not final agency action subject to judicial review under the APA and it is not a "de facto rule or binding norm that could not properly be promulgated absent the notice-and-comment rulemaking required by § 533 of the APA." Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 806 (D.C. Cir. 2006). As explained above, the Memorandum is subject to the Regulatory Flexibility Act only if notice and comment rulemaking is required.

Whether a disputed "rule" is a legislative rule turns on whether it has "the force of law," meaning that "Congress has delegated legislative power to the agency and [] the agency intended to exercise that power in promulgating the rule." Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993). The agency's intent to exercise legislative power may be shown where the second rule effectively amends the previously adopted legislative rule, either by repudiating it or by virtue of the two rules' irreconcilability. Id. Another indication of a legislative rule is whether, in the absence of the rule, the agency would lack an adequate legislative basis to ensure the

performance of duties. Id. at 1112.[2] In contrast, a good indication of a general policy statement is the agency's use of permissive, rather than binding, language; if the "rule" leaves the agency free to exercise discretion, it is likely a policy statement. Id. at 1111.

First, Plaintiffs argue that the Neufeld Memorandum is a legislative rule because it is binding, both on its face and as applied. However, the evidence demonstrates that the Memorandum is intended to provide only guidance for application of the Regulation, not to establish independent binding rules. To begin with, the Memorandum states as much: it declares that it "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." Memorandum at 1. In addition, the Memorandum explains that the impetus for its issuance was the "lack of guidance" on the Regulation's application, which in some contexts, including third-party employment, "has raised problems." Id. at 2.

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[2] The parties do not dispute that, in the absence of the Memorandum the agency has an adequate basis--the Regulation--to ensure the performance of its duties in reviewing and approving or denying H-1B visa applications. Am. Mining Congress, 995 F.2d at 1110. The Court's analysis thus focuses on whether the Memorandum is binding on USCIS adjudicators or substantively amends the Regulation.

The Memorandum also explains that the approach it relies on to interpret the definition of "employer-employee relationship" under the Regulation is in keeping with the agency's long-standing approach: "[t]o date, USCIS has relied on common law principles and two leading Supreme Court cases [Nationwide Mutual Ins. Co. V. Darden, 503 U.S. 318, 322-23, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992) and Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003)] in determining what constitutes an employer-employee relationship." Id. The Memorandum states that its eleven factors are derived from the common law, and the Memorandum emphasizes that "no one factor [is] decisive" and that "the common law is flexible about how [they] are to be weighed." Id. at 5. On its face, then, the Memorandum clearly does not purport to establish a new substantive rule with binding effect.

Turning to the Memorandum's application, there is no evidence that it either binds USCIS adjudicators or requires a different outcome for third-party employers like Plaintiffs than the Regulation does. In fact, in addition to emphasizing that no single factor among the eleven is dispositive, the Memorandum instructs USCIS adjudicators to look to the totality of the circumstances in each case to determine whether there is an employer-employee relationship. Id. at 4.

Plaintiffs respond by arguing that the Memorandum "ordains the result in any petition filed by a third-party contractor" because it describes scenarios involving business models identical to Plaintiffs' and instructs adjudicators that such third-party employers do not exercise sufficient control to find an employer-employee relationship. Pls.' Reply at 10; Memorandum at 6-7, 14-15. However, the Memorandum makes very clear that the scenarios are "meant to be illustrative examples." Memorandum at 5 n.7. Indeed, Plaintiffs do not dispute that USCIS has approved four H-1B visa applications by third-party employers since the Neufeld Memorandum was issued, thereby indicating that the scenarios do not pre-ordain the outcome of Plaintiffs' H-1B visa applications. Defs.' Opp'n at 41-42. Because the Memorandum, both on its face and in its application, leaves USCIS adjudicators considerable discretion in applying the eleven factors, the Court concludes that it is not binding.

Second, Plaintiffs argue that the Memorandum effectively amends the Regulation because its eleven factors "do not merely add crispness to guidelines," but instead replace the five-factor control test. Pls.' Reply at 6. Specifically, Plaintiffs point to three factors in the Memorandum which they argue are unrelated to control: (i) does the beneficiary use proprietary information of the petitioner to perform the duties of employment; (ii) does the beneficiary produce an end product that is directly linked to the

petitioner's line of business; and (iii) does the petitioner provide the tools or instrumentalities needed by the beneficiary to perform the duties of employment. Id. at 11; Memorandum at 4-5.

While Defendants have not identified any common law authority for these three factors, the question before the Court is not whether the agency has properly interpreted the common law, but whether the Memorandum's inclusion of these factors substantively amends the Regulation by repudiating it or by rendering the two irreconcilable. See Ctr. for Auto Safety, 452 F.3d at 808. The control test states that an employer-employee relationship may be established for employers who hire, pay, fire, supervise, or, in a catch-all provision, "otherwise control the work of [an] employee." 8 U.S.C. § 214.2. Because the catch-all provision's breadth means the agency possesses wide latitude in interpreting the Regulation, the three factors that Plaintiffs challenge cannot be said to substantively amend the Regulation's control test.[3]

Plaintiffs argue in the alternative that the Memorandum substantively amends the agency's Adjudicator's Field Manual, which

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[3] Plaintiffs' likely response is that the Memorandum's inclusion of these factors, even if not a substantive amendment of the Regulation, marks a shift in the agency's interpretation of the Regulation which requires notice and comment. See Pls.' Mot. at 11-12; Envt'l Integrity Project v. EPA, 425 F.3d 992 (D.C. Cir. 2005). However, the Neufeld Memorandum constitutes the agency's first written guidance on the definition of "employer-employee relationship" under the Regulation. In the absence of evidence that the use of these three factors is inconsistent with a prior interpretation of the agency, this argument must be rejected.

is binding on USCIS adjudicators. However, as the Government explains, the Manual provides that memoranda lacking the designation "P", such as the Neufeld Memorandum, are merely advisory. See USCIS, Adjudicator's Field Manual § 3.4(a) (2010). In addition, the Manual's statement that "[p]olicy material is binding on all USCIS officers and must be adhered to unless and until revised" simply refers to the fact that an agency's interpretation of its own regulations is binding, see Am. Mining Congress, 995 F.2d at 1110, not that the guidelines establish an independent source of binding legal authority. See also Defs.' Opp'n at 24-25.

To summarize, the Court concludes that the Memorandum establishes interpretive guidelines for the implementation of the Regulation, and does not bind USCIS adjudicators in their determination of Plaintiffs' H-1B visa applications. In addition, the Court is satisfied that the Memorandum does not amend the Regulation by repudiating or being irreconcilable with it. The Memorandum therefore does not constitute a legislative rule.

This conclusion also comports with the more general test established in Bennett v. Spears for determining when agency action is "final": "the action must mark the 'consummation' of the agency's decision making process - it must not be of a merely tentative or interlocutory nature. . . . [and] the action must be one by which rights or obligations have been determined, or from which legal consequences flow." 520 U.S. at 177-78 (citation and

internal quotations omitted). For the reasons stated, even if the Court were to consider the Memorandum to be the "consummation" of the agency's decision making process--which it does not--the Memorandum does not determine, as a matter of law, the rights or obligations of H-1B visa applicants, the agency, or any other entity, and no discernible legal consequences flow from it. See also Ctr. for Auto Safety, 452 F.3d 798 (concluding that guidelines issued by the National Highway Traffic Safety Administration which interpreted the scope of an agency regulation were not final agency action, and therefore not reviewable under the APA).

In short, the Memorandum does not constitute final agency action subject to judicial review and the notice and comment requirements under the APA. Counts I, III, IV, and V alleging violations of the APA must therefore be **dismissed** for failure to state a claim under § 704. The only remaining count in the Complaint, Count II, which alleges a violation of the Regulatory Flexibility Act, must also be **dismissed**, as the Memorandum is not subject to notice and comment or publication, since it is not a legislative rule, and thus the statute does not apply.

**CONCLUSION**

For the reasons set forth above, this case is **dismissed with prejudice**. A separate Order will accompany this Memorandum Opinion.

August 13, 2010

/s/
Gladys Kessler
United States District Judge

Copies to: attorneys on record via ECF

## Jowett, Haley L

**From:** Perkins, Robert M
**Sent:** Friday, March 19, 2010 5:56 AM
**To:** Johnson, Bobbie L; Young, Claudia F
**Cc:** Doherty, Shannon P; Sweeney, Shelly A; Gooselaw, Kurt G; Nguyen, Carolyn Q
**Subject:** FW: Limiting H-1B Validity Dates
**Attachments:** RE: Employer-Employee Memo- Cognizant ; Wipro Example.pdf; Infosys Validity Date Example.pdf

Bobbie and Claudia,

As you are aware, VSC did not limit validity dates as a general rule prior to the release of the employer-employee memo and follow-up Q&As (email from Shelly on 2/24/10) noted in blue and red below. Since providing guidance to our officers (see Mandy's message below) we have encountered a few scenarios that we would like further clarification.

1- See attached Wipro example - This petition seeks a COS for two years and 8 months. Until the employer-employee memo came out, we accepted their statements of in-house employment knowing they were liable for their statements and accountable during any site visit. We granted the time requested. The beneficiary of this petition will be working at a Wipro location in East Brunswick, NJ on a project for Cisco Systems, Inc. The project and its length are not documented. Since the employer-employee memo came out we have started requesting evidence of the duration of the in-house project for companies that are H-1B dependent, meet the 10/25/10 criteria, or have fraud concerns. Note: Wipro filed over 2,500 H1B petitions between 10/1/2008 – 9/30/2009. I personally would prefer not to issue thousands of RFEs for our top filers such as Wipro, Tata, Cognizant, Infosys, etc. when the duration of an in-house project is not documented, but will do so if that is what SCOPS expects. The better alternative may be to limit the stay to one year without the benefit of an RFE?

2- See attached Infosys example – The end client letter states "We anticipate a need for the services of 500 Infosys personnel for 2 years commencing from the date they arrive in the US in H-1B status. If the beneficiary is abroad, we won't know the date of arrival, so we intend to grant two years without issuing an RFE and allowing the petitioner to submit additional evidence for the duration of the validity period requested.

On this topic, the Q&A that accompanied the employer-employee memo addresses limiting validity (question 7, page 2). Has any of the further clarification below (specifically the one year rule) been shared with our stakeholders? Now that we are limiting validity periods, AILA is inquiring on individual cases. It would be helpful to know what you have or have not shared with our stakeholders at this point.

QUESTION: For in-house work assignments will we accept the petitioner's statement regarding the work assignment or can we request evidence to validate the petitioner's claim? For example, the beneficiary will work on a project at the petitioner's location. The petitioner indicates the project is for their client Whirlpool. Can we request documentation that serves as evidence of the agreement between the petitioner and Whirlpool? We would probably avoid this line of questioning with large well known companies, however I have concerns that the small IT staffing-type companies will try to make the in-house claim after receiving an rfe for an itinerary and right to control, when in reality they probably don't have facilities to house their workers. Many of these small IT staffing companies have mail and phone services at an office building, without renting space (aka a virtual office).

RESPONSE: If an adjudicator is not satisfied with the evidence submitted by the petitioner to establish that a valid employer-employee relationship will exist when the beneficiary is placed at an in-house work assignment, the adjudicator may request additional evidence as needed. Please remember, you cannot specifically require submission of a particular type of document unless it is required by regulations.

QUESTION: How much time do we provide for a validity period if there is evidence of an employer-employee relationship for less than one year?

RESPONSE: If sufficient evidence of an employer-employee relationship for the duration of the requested validity period is not demonstrated, you may issue an RFE to give the petitioner the opportunity to correct the deficiency. If the response to the RFE still does not demonstrate an employer-employee relationship for the entire period requested then a validity period of no less than one year (but up to the duration of the period of time that a valid employer-employee relationship has been established) may be granted if the petitioner establishes the employer-employee relationship for a period of time less than the validity period requested as long as:

- the petition is otherwise approvable;
- the beneficiary will not exceed the maximum allowable period of time in H-1B status (or under AC21); and
- the LCA is valid for that period of time.

QUESTION: If the petitioner is an IT consulting firm and there is evidence of an in-house project for one year, but three years is requested, do we give the one year or the three years?

RESPONSE: The petition may be approved for the duration of time in which an employer-employee relationship has been demonstrated (please see the response above for further information).

Thanks,

Rob

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**From:** Bouchard, Armanda M
**Sent:** Friday, February 26, 2010 4:23 PM
**To:** VSC Allied Group 3; VSC Allied Group 6
**Subject:** Limiting H-1B Validity Dates

Hello H-1B Officers,

This email provides guidance on limiting H-1B approval dates for petitioners who are required to provide an itinerary of employment (H-1B dependent employers, employers meeting the 10/25/10 plus 1 criteria, and employers with an SOF). Please consult with the H-1B guide beginning on page 31 if you have questions about the itinerary requirement for these categories. These are the same itinerary requirements that have been in effect since April 2009.

- Effective today, for those employers that we require to establish an itinerary, we will limit the validity dates to the duration of the documented work assignment or one year, whichever is longer. In other words, approvals will be for at least one year or for the duration of the documented work assignment.

- If you are adjudicating a new case and there is sufficient evidence of a work assignment, either in-house or at a client location, but the length of the work assignment is not indicated, send the attached rfe.

- If you already have or you will be sending an rfe in CG using 2134, 2135, or 2139, then the work assignment dates have been requested. Upon reviewing the response, grant an appropriate amount of time, for no less than one year.

- In-house employment follows the same rule. We will limit the validity dates to the duration of the documented work assignment or one year, whichever is longer .

Please forward questions to the AG3 Senior mailbox, as I will be our next Monday and Tuesday.

Thank you,

Mandy

## Jowett, Haley L

**From:** Sweeney, Shelly A
**Sent:** Wednesday, February 24, 2010 12:57 PM
**To:** Nguyen, Carolyn Q; Perkins, Robert M; Gooselaw, Kurt G
**Cc:** Velarde, Barbara Q; Young, Claudia F; Johnson, Bobbie L; Doherty, Shannon P
**Subject:** RE: Employer-Employee Memo- Cognizant
**Attachments:** H1B Memo Questions OCC Cleared 2-24-10.doc

Please see attached responses regarding questions that came up during/after our teleconference on the employer-employee memo.

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**From:** Nguyen, Carolyn Q
**Sent:** Tuesday, February 23, 2010 4:06 PM
**To:** Perkins, Robert M; Johnson, Bobbie L
**Cc:** Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
**Subject:** RE: Employer-Employee Memo- Cognizant

Hi,

Are we on status quo for Cognizant cases or are we to apply the memo and require the establishment of the employer-employee relationship throughout the period requested?

Thanks.

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**From:** Perkins, Robert M
**Sent:** Wednesday, February 17, 2010 10:55 AM
**To:** Nguyen, Carolyn Q; Johnson, Bobbie L
**Cc:** Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
**Subject:** RE: Employer-Employee Memo- Cognizant

I believe this was a SCOPS action item following our conference call on January 20th....VSC has remained "status quo" while waiting further clarification on this issue. On a related note, attached are the RFE templates (view in print layout) that we intend to start utilizing as a result of the employer-employee memo.

Rob

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**From:** Nguyen, Carolyn Q
**Sent:** Tuesday, February 16, 2010 6:35 PM
**To:** Young, Claudia F; Johnson, Bobbie L
**Cc:** Perkins, Robert M; Gooselaw, Kurt G
**Subject:** FW: Employer-Employee Memo- Cognizant

Hi,

Just wanted to give you a heads up....the new memo dated 01/08/2010 states that a petitioner must establish that there exists a valid employer-employee relationship throughout the requested H-1B period. This may be a change on the validity period for some of the Cognizant cases.

Thanks.

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**From:** Devera, Jennie F
**Sent:** Wednesday, February 10, 2010 4:08 PM
**To:** Nguyen, Carolyn Q
**Subject:** Employer-Employee Memo- Cognizant

Hi, Carolyn,

Does the 1/8/10 "Employer-Employee" memo change the way we are reviewing Cognizant cases?

- Prior to the memo if they did not provide a contract end-date or the estimated end-date is speculative, we have been giving them one year validity date. I understand that we will no longer assign **one-year** validity date on cases that have less than a year contract. The case will be granted for time that they can prove. We will give them the benefit of an RFE before limiting the validity dates.
- To establish an employer-employee relationship, page 8 of the memo provides a list of documentation that can be provided. However, on Cognizant filings, at a minimum we will take a statement from them which identifies the end-client.

Please confirm if these are correct.

Thanks

Jennie

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**From:** Nguyen, Carolyn Q
**Sent:** Monday, June 22, 2009 1:53 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: Cognizent

Although the guidance below is specific to Cognizant cases, it will probably be adopted for other off-site H-1B employment and the L-1B specialized knowledge cases. We'll get confirmation this week. Thanks.

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**From:** Gregg, Bret S
**Sent:** Monday, June 22, 2009 1:45 PM
**To:** Nguyen, Carolyn Q; Gooselaw, Kurt G
**Cc:** Chau, Anna K; Poulos, Christina
**Subject:** FW: Cognizent

Carolyn/Kurt – please advise your divisions. I assume this is the same approach we will take with similar companies and can discuss with Barbara tomorrow. Thanks

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**From:** Kruszka, Robert F
**Sent:** Monday, June 22, 2009 11:18 AM
**To:** Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
**Cc:** Williams, Carol L; Cummings, Kevin J; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q
**Subject:** FW: Cognizent

Don and Barbara met with Mike Aytes on Friday regarding the Cognizant cases.
Their discussion focused on the H1B and L1B scenarios and Mike articulated the following expectations:

**H1B:** On an initial filing since Cognizant is an H1B dependant company and also engages in 3rd party contracting. At a minimum there needs to be an LCA specific to the location where the beneficiary will be working, documentation that clearly outlines the duties and documentation that identifies the third party employer. He stated his support in obtaining this documentation but said it didn't have to be specifically contained within a contract. So it would appear the documentation CSC just received while arguably sufficient for purposes of identifying specialty occupation work at a third party site, the LCA for a different geographical area would be a disqualifier. Mike agrees the LCA on record must comport with the identified third party employment site

**H1B Extensions:** W2 or other appropriate wage documents are necessary to establish that the beneficiary maintained status. A contract or similar documentation as above is appropriate to support the offer of employment as well as the LCA requirement given the fact that Cognizant contracts out.

**L1B:** Initial filings need to appropriately evidence the specialized knowledge requirement and beneficiary's qualifications. He indicated a level of concern with 3rd party employer scenarios being able to meet the L1B standard per the Visa Reform when the beneficiary's specialized knowledge is specific to the petitioner not clear how that translates to the 3rd party employer. Evidence must be provided to show that Cognizant rather than the end client will exert control over the beneficiary.

**L1B: Extensions:** We generally will not re adjudicate the initial finding regarding the beneficiary's specialized knowledge. We generally will defer to the past adjudication when the present duties at the extension phase are essentially the same as those outlined in the initial filing. However, given the fact that Cognizant is involved in supporting offsite employment, even at the extension phase sufficient documentation must be provided to detail and show that Cognizant rather than the end client will exert control over the beneficiary. In addition, to determine maintenance of status, appropriate wage documents may be requested.

The bottom line is if we did not apply the proper L1B specialized knowledge standard at the time of the initial decision, we will not revisit it unless there was misrepresentation in the initial filing. We have to make the right decision the first time and folks will be able to rely to a substantial degree on that initial finding. These types of cases will over time become less of an issue since the post Visa Reform standard is now the norm.

Guidance on the general adjudication's standard relative to the L1B specialized knowledge extension cases will be forthcoming. However, please use this email in focusing the adjudication of these cases. Please let me know if a call is needed and as always feel free to pose any follow up questions.

Thank you as always for your continued cooperation and support

QUESTION: For in-house work assignments will we accept the petitioner's statement regarding the work assignment or can we request evidence to validate the petitioner's claim? For example, the beneficiary will work on a project at the petitioner's location. The petitioner indicates the project is for their client Whirlpool. Can we request documentation that serves as evidence of the agreement between the petitioner and Whirlpool? We would probably avoid this line of questioning with large well known companies, however I have concerns that the small IT staffing-type companies will try to make the in-house claim after receiving an rfe for an itinerary and right to control, when in reality they probably don't have facilities to house their workers. Many of these small IT staffing companies have mail and phone services at an office building, without renting space (aka a virtual office).

DRAFT RESPONSE: If an adjudicator is not satisfied with the evidence submitted by the petitioner to establish that a valid employer-employee relationship will exist when the beneficiary is placed at an in-house work assignment, the adjudicator may request additional evidence as needed. Please remember, you cannot specifically require submission of a particular type of document unless it is required by regulations.

QUESTION: How much time do we provide for a validity period if there is evidence of an employer-employee relationship for less than one year?

RESPONSE: If sufficient evidence of an employer-employee relationship for the duration of the requested validity period is not demonstrated, you may issue an RFE to give the petitioner the opportunity to correct the deficiency. If the response to the RFE still does not demonstrate an employer-employee relationship for the entire period requested then a validity period of no less than one year (but up to the duration of the period of time that a valid employer-employee relationship has been established) may be granted if the petitioner establishes the employer-employee relationship for a period of time less than the validity period requested as long as:

- the petition is otherwise approvable;
- the beneficiary will not exceed the maximum allowable period of time in H-1B status (or under AC21); and
- the LCA is valid for that period of time.

QUESTION: If the petitioner is an IT consulting firm and there is evidence of an in-house project for one year, but three years is requested, do we give the one year or the three years?

DRAFT RESPONSE: The petition may be approved for the duration of time in which an employer-employee relationship has been demonstrated (please see the response above for further information).

QUESTION: On page 3 at the bottom, the third fact is, "Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?" I keep getting tripped on the last clause, "if such control is required". Do you know what this is saying/asking?

DRAFT RESPONSE: We interpret this as referring back to the phrase "day-to-day basis". As mentioned later in the memo, adjudicators are to keep the nature of the business in mind when reviewing the petition. If the nature of the occupation would require supervision and control on a day-to-day basis, then the petitioner should be able to demonstrate the "right to control" the beneficiary's work on a day-to-day basis.

**Jowett, Haley L**

**From:** Gregg, Bret S
**Sent:** Tuesday, March 30, 2010 11:36 AM
**To:** Nguyen, Carolyn Q; Gooselaw, Kurt G
**Cc:** Nguyen Ho, Lynn; Fisher, Sheila C; Poulos, Christina
**Subject:** FW: OCC Cleared Employer-Employee Relationship Templates
**Attachments:** H-1B Empr-Empe Relation Consolidated RFE 3-30-10 OCC Cleared.doc

**Importance:** High

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**From:** Velarde, Barbara Q
**Sent:** Tuesday, March 30, 2010 9:35 AM
**To:** Renaud, Daniel M; Hazuda, Mark J; Poulos, Christina; Gregg, Bret S
**Cc:** Johnson, Bobbie L; Young, Claudia F; Neufeld, Donald
**Subject:** FW: OCC Cleared Employer-Employee Relationship Templates
**Importance:** High

CSC and VSC:

OCC has cleared the employer-employee relationship RFE templates. Please distribute as appropriate and ensure folks begin using them.

SCOPS would like to stress the following regarding the templates:

- this is not part of the RFE project so the service centers can use this cleared language in their format (letter form for CSC and call-ups for VSC);
- CSC and VSC can tailor introductory/transitional language as needed but the meat of these RFE templates should remain unchanged;
- you must contact SCOPS first if you are seeking to modify the pertinent language of this template;
- the templates should remain in the 2nd person. The Agency has adopted that standard. Change into the 2nd person will be done incrementally as new templates are created; and
- both SCs can remove the highlighting from this document if they choose to do so as it was intended to assist OCC in identifying instructions to the officers.

I would like to remind the service centers that the main issue to be evaluated under the memo is whether the petitioner has the "right to control" the beneficiary. Officers need to keep in mind that right to control is different from actual control. If you have any questions regarding the difference between "right to control" and actual control, please contact BEST. Finally, we still need to have medical professional and sole proprietor cases sent to us. The concern is whether or not we got the standard correct for these folks and that the memo is not causing any unintended consequences. We are not asking for review to second guess your decision, but instead because of the concerns raised by stakeholders and potential impact this could have for some discrete petitioners/beneficiaries. We really need you to cooperate with us on this while we work with OCC and OPS to get these issues right.

Barbara Q. Velarde
Deputy Associate Director
Service Center Operations Directorate
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, Room 2134

Washington, DC 20529

**The Petitioner**

Documentation submitted with your petition indicates that you provide [INDICATE THE TYPE OF SERVICE PROVIDED SUCH AS: information technology consulting services, information technology staffing solutions, information technology solutions, healthcare staffing solutions, etc].

**Itinerary of Employment and Work Site Information [Use only if this applies]**

Your petition was filed without an itinerary of employment. USCIS regulations provide that an H petition which requires services to be performed in more than one location must include an itinerary with the dates and locations of the services to be provided.

Provide an itinerary of services or engagements with the dates and locations of the services. The itinerary may also include documentation from the end-client employer receiving the beneficiary's services to establish:

- The name of the project the beneficiary is assigned to;
- The address where the beneficiary performs the work;
- The title and duties of the beneficiary's position;
- The contracted employment dates;
- Whether there is a vendor through whom the beneficiary's services are provided;
- The name of the vendor, if applicable;
- Contact information from the end-client which includes the name, address, email, and telephone number where the contact can be reached; and/or
- The name, title, and contact information of the person who will supervise the beneficiary at the work site.

**Right to Control [Use only if this applies]**

As an employer who seeks to sponsor a temporary worker in an H-1B specialty occupation, you are required to establish by a preponderance of the evidence that a valid employer-employee relationship will exist between you and the beneficiary, and that you have the right to control the beneficiary's work, which may include the ability to hire, fire, or supervise the beneficiary. Also, you should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. You have requested a validity period from [BEGINNING DATE] to [ENDING DATE].

In support of the petition, the following evidence was submitted to establish an employer-employee relationship:

**[Carefully review the supporting evidence and delete any of the following items that were not provided in the initial petition or add any not listed below.]**

- An itinerary of services or engagements;
- Copy of a signed Employment Agreement between you and the beneficiary;
- Copy of an employment offer letter;
- Copy of relevant portions of valid contracts between you and a client;
- Copies of [**Choose**: contractual agreements, statements of work, work orders, service agreements, and letters ] between you and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary;
- Copy of the position description;
- A description of the performance review process; and/or
- Copy of your organizational chart, demonstrating the beneficiary's supervisor chain.
- Other: **[List evidence not included above]**

However, this evidence is insufficient to establish that a valid employer-employee relationship will exist for the duration of the requested validity period.[**ARTICULATE THE REASON(S) WHY THE RECORD DOES NOT ESTABLISH RIGHT TO CONTROL (E.G. DOESN'T COVER THE ENTIRE VALIDITY PERIOD) OR SELECT ONE OR A COMBINATION OF THE FOLLOWING:**

**OPTION 1** Your petition does not establish when, where, or for whom the beneficiary is assigned to work pursuant to an end-client engagement for the requested validity period. You have not documented the end-client, the end-client's vendor through whom the beneficiary is assigned to work (if applicable), the physical work location, or the contracted dates of service. Part 5 of your petition **SELECT ONE:** indicates the work location as **XXX**, with no other information about the employer at this address **OR SELECT** does not provide any alternate work location aside from your physical location.

**OPTION 2** You indicate that the beneficiary will be engaged to work at **END-CLIENT** at **ADDRESS LOCATION**, however this work arrangement is not documented, nor have you established your right to control when, where, and how the beneficiary performs the job.

**OPTION 3** Your petition documents the beneficiary's assignment of work with **DIRECT END-CLIENT** at **ADDRESS LOCATION**, however the documentation provided does not establish your right to control when, where, and how the beneficiary performs the job with your client.

**OPTION 4** Your petition documents the beneficiary's assignment of work with **END-CLIENT** at **ADDRESS LOCATION**. **VENDOR NAME** is the vendor through whom the beneficiary works to provide services to **END-CLIENT**. The documentation provided does not establish your right to control when, where, and how the beneficiary performs the job with a third party employer.]

USCIS must determine if you have the right to control the employee through evidence that describes (with no one factor being decisive or exhaustive):

- the skill required to perform the specialty occupation;
- the source of the instrumentalities and tools required to perform the specialty occupation;
- the location of the work;
- the duration of the relationship between you and the beneficiary;
- whether you have the right to assign additional work to the beneficiary;
- the extent of the beneficiary's discretion over when and how long to work;
- the method of payment of the beneficiary's salary;
- the beneficiary's role in hiring and paying assistants;
- whether the specialty occupation work is part of your regular business;
- whether you are in business;
- the provision of employee benefits;
- the tax treatment of the beneficiary;
- whether you can hire or fire the beneficiary or set rules and regulations on the beneficiary's work;
- whether, and if so, to what extent you supervise the beneficiary's work; and/or
- whether the beneficiary reports to someone higher in your organization.

**[Also include the next section if the beneficiary is shareholder/owner.]**

USCIS will also evaluate the below factors as the record [**Choose one**: suggests/indicates] that the beneficiary is also a shareholder or owner of your organization (again with no one factor being decisive or exhaustive):

- whether your organization can hire or fire the beneficiary or set rules and regulations on the beneficiary's work;
- whether, and if so, to what extent your organization supervises the beneficiary's work;
- whether the beneficiary reports to someone higher in your organization;
- whether, and if so, to what extent the beneficiary is able to influence your organization;
- whether the parties intended that the beneficiary be an employee, as expressed in written agreements or contracts; and/or
- whether the beneficiary shares in the profits, losses and liabilities of your organization.

**[Only request the following evidence if it has not been submitted or, if it has been submitted, it LACKS SUFFICIENT DETAIL to establish an employer-employee relationship as described above.]**

As such, it is requested that you demonstrate an employer-employee relationship with the beneficiary through the right to control the manner and means by which the product or services are accomplished for the duration of the requested H-1B validity period by providing a combination of the following or similar types of evidence. This list is not

inclusive of all types of evidence that may be submitted. You may submit any and all evidence you feel would meet the employer-employee requirement.

**[Delete those items below that are already in the record or not applicable]**

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employer, 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 you and the 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 you and a client (with whom you have entered into a business agreement for which your employees will be utilized) that establishes that while your employees are placed at the third-party work site, you will continue to have the right to control your employees;

- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between you 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 the 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 you and beneficiary, whether you have the right to assign additional duties, the extent of your discretion over when and how long the beneficiary will work, the method of payment, your role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of your regular business, the provision of employee benefits, and the tax treatment of the beneficiary in relation to you;

- A description of the performance review process; and/or

- Copy of your organizational chart, demonstrating the beneficiary's supervisory chain.

**Maintenance of Initial Employer-Employee Relationship [Use only if this applies]**

Your extension petition was filed without sufficient evidence to document that a valid employer-employee relationship was maintained with the beneficiary throughout the previous H-1B approval period.

You may provide a combination of the following or similar types of evidence to document that you and the beneficiary maintained the employer-employee relationship throughout the H-1B approval period:

**[Delete those items below that are already in the record or not applicable]**

- 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 W-2 forms, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of work schedules from prior years;
- Copies of your state quarterly wage reports for the last four quarters that contain the name, social security numbers (last four digits only), and number of weeks worked by the beneficiary;
- Copies of the beneficiary's two or three most recently filed federal individual tax returns with all required schedules and statements, as appropriate;
- 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, website 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 and dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

**In-House Employment to be Used In Instances Where the Petitioner is in the Business of Consulting But Indicates that the Beneficiary Will be Working on a Project In-House [Use only if this applies]**

If the beneficiary will work on a project at your own location, provide evidence that demonstrates you have sufficient specialty occupation work that is immediately available upon the beneficiary's entry into the United States through the entire requested H-1B validity period by providing a combination of the following or similar types of evidence. This list is not inclusive of all types of evidence that may be submitted. You may submit any evidence you feel would establish sufficient specialty occupation work.

**[Delete those items below that are already in the record or are not applicable]**

- Copy of signed Employment Agreement between you 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, statements of work, work orders, service agreements, and letters between you and the authorized officials of the ultimate end-client companies to whom the end product or services worked on by the beneficiary will be delivered;

- Copy of a position description or any other documentation that describes the skills required to perform the job offered, the tools needed to perform the job, the product to be developed or the service to be provided, the method of payment, whether the work to be performed is part of your regular business, the provision of employee benefits, and the tax treatment of the beneficiary by you;

- Signed copies of your two or three most recently filed Federal income tax returns to include all required schedules and statements, as appropriate, if the beneficiary is requesting an extension of stay;

- Copies of company brochures, pamphlets, internet website, or any other printed work published by you which outlines, in detail, the products or services provided by your company;

- Evidence of sufficient production space and equipment to support the beneficiary's specialty occupation work.

**[The below are specifically tailored to the IT consulting industry; if this RFE is being used for other consulting industries, the officer must delete or tailor the below items as applicable.]**

- Copies of critical reviews of your software in trade journals that describes the purpose of the software, its cost, and its ranking among similarly produced software manufacturers;

- Proof of your software inventory;
- Proof of sufficient warehouse space to store your software inventory;
- Copy of the marketing analysis for your final software product;
- Copy of a cost analysis for your software product; and/or
- Evidence of sufficient production space and equipment to support the production of your software.

## Jowett, Haley L

**From:** Perkins, Robert M
**Sent:** Thursday, July 15, 2010 8:52 AM
**To:** Johnson, Bobbie L; Gooselaw, Kurt G; Nguyen, Carolyn Q
**Cc:** Young, Claudia F; Doherty, Shannon P; Sweeney, Shelly A; Kermani, Souzan B
**Subject:** FW: Right to Control
**Attachments:** Specialty Occupation RFEs.doc; H-1B Guide RTC.doc; RE: wac 10-181-50323 (PP); FW: Final H1B Memo Materials

Bobbie,

Adding Kurt and Carolyn as a follow-up to our discussion yesterday and to ensure we are all on the same page. Prior to the issuance of the EE memo, we typically would not have questioned right to control for staffing entities in the business of staffing hospitals with physicians. Subsequent to said memo, we have continued to approach this particular scenario in a liberal manner (Note: this scenario is specifically mentioned in the RTC portion of the VSC H1B User Guide) and typically find petitions meet the preponderance of the evidence standard without RFE issuance (although we have sent some to HQ for review).

If you do not agree with this approach, please let me know and we will course correct. After a review of the attached email string titled "RE: wac 10-181-50323" I believe that it would serve all of our best interest if you could provide clarification on this issue, as I may have read too much into Barbara's message dated 1/13/2010 (attached) where she states "we don't expect any major shift in adjudication".

Thanks,

(b)(6)

**Robert M. Perkins| Assistant Center Director| Vermont Service Center |USCIS |** ☎ [redacted]

---

**From:** Bouchard, Armanda M
**Sent:** Wednesday, July 14, 2010 4:28 PM
**To:** Johnson, Bobbie L; Young, Claudia F; Doherty, Shannon P; Sweeney, Shelly A
**Cc:** Perkins, Robert M; Shuttle, Peter J; Bolog, Marguerite M; Lamothe, Judy L; Rhodes-Gibney, Cathy S
**Subject:**

Bobbie and Claudia,

Attached are VSC's specialty occupation rfes. Anything in red or yellow is hidden text. Also attached is the section of the H-1B guide for RTC.

We have several H-1B guide changes pending with our Center Training Unit. Once they are complete, I'll ask the training unit to send you the updated version of the guide.

Armanda Bouchard ISO3
USCIS Vermont Service Center
802 527 4700 1 4906

# Specialty Occupation RFEs

## Specialty Occupation RFE 1

The record is not persuasive in establishing that the job offered requires the services of a person performing a "specialty occupation," i.e., the holder of at least a baccalaureate degree in a related field. EXPLAIN WHY THE EVIDENCE IS NOT PERSUASIVE.

Submit evidence showing that:

- A baccalaureate or higher degree, or its equivalent, in a specific field of study is normally the minimum requirement for entry into the particular position; or
- The proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific field of study; or
- In your company or industry, a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered. Attestations to industry standards must be for similar positions among similarly situated companies; or
- The nature of the specific duties for the proffered position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific field of study.

If you publicized the job opening, submitting tear sheets or other advertising documentation may help establish the educational requirements for the proffered position of JOB TITLE.

If you have previously employed individuals in the position of JOB TITLE, submit documentary evidence such as W-2 Forms and copies of degrees and transcripts to verify:

- The number of individuals you have employed in this position in the past;
- The level of education held by each individual and
- The field of study in which the degree was earned.

## Specialty Occupation RFE 2

The duties and responsibilities you have described are vague and do not clearly establish the need for an individual who possesses the minimum of a baccalaureate degree in a specific field of study. For example, you state the beneficiary will "EXAMPLE(S) OF VAGUE JOB DESCRIPTION(S)." It is unclear from this limited description how such duties would require the services of someone who holds the minimum of a baccalaureate degree in FIELD OF STUDY or a related field. Therefore, further evidence is required.

Submit a detailed statement to:

- explain the beneficiary's proposed duties and responsibilities,
- indicate the percentage of time devoted to each duty,

- state the educational requirements for these duties, and
- explain how the beneficiary's education relates to the position.

## Specialty Occupation RFE 3

**This RFE is ONLY to be used by fraud officers when there is an SOF or FVM in the file and the end client is a questionable company claiming to develop IT products.**

You indicate that the beneficiary will be assigned to work with END CLIENT at ADDRESS LOCATION. You provide workers to this end client through your vendor, VENDOR NAME.

You have not established that there will be sufficient specialty occupation work with END CLIENT for the entire requested validity period. Submit a combination of the following or similar types of evidence that will demonstrate sustained specialty occupation work for the dates requested.

**Delete the items below that are already in the record.**

- Documentation between your client and authorized officials of the companies receiving the end product or services that will be worked on by the beneficiary such as:
  - relevant portions of valid contracts,
  - statements of work,
  - work orders,
  - service agreements, and
  - letters;

- Copy of a position description or any other documentation that describes
  - the skills required to perform the job offered,
  - the tools needed to perform the job,
  - the product to be developed or the service to be provided,
  - the method of payment, and
  - whether the work to be performed is part of the client's regular business;

- Copies of company brochures, pamphlets, pages from internet website, or any other printed work published by the client that provides details pertaining to the products or services they provided;

- Evidence of sufficient production space and equipment to support the beneficiary's specialty occupation work;

- Copies of critical reviews of the client's software in trade journals that describes the purpose of the software, its cost, and its ranking among similarly produced software manufacturers;

- Proof of the client's software inventory;

- Proof of sufficient warehouse space to store the client's software inventory;

- Copy of the marketing analysis for the client's final software product;
- Copy of a cost analysis for the client's software product; and/or
- Evidence of sufficient production space and equipment to support the production of the client's software.

This list is not inclusive of all types of evidence that may be submitted. You may submit any evidence you feel will establish sufficient specialty occupation work.

## Specialty Occupation RFE 4

U.S. Citizenship and Immigration Service (USCIS) does not use a job title, by itself, when determining whether a particular position qualifies as a specialty occupation. The specific duties of the offered position, combined with the nature of the petitioning entity's business operations, are factors that USCIS considers.

Documentation submitted with your petition indicates that your organization is a INDICATE THE PETITIONER'S INDUSTRY E.G., GAS STATION. You currently employ ## individuals and you wish to employ the beneficiary as JOB TITLE.

You have not provided sufficient evidence to establish that an individual must have a bachelor's degree in a specific field of study in order to perform the duties of the position. Also, it is not clear how the beneficiary will be relieved from performing non-qualifying functions because EXPLAIN WHY; E.G., "you have only 2 employees," OR "the beneficiary will also serve as president of your organization". Therefore, additional evidence is required.

Submit documentation highlighting the nature, scope, and activity of your business enterprise along with evidence to establish the beneficiary will be employed with the duties you have set forth. Such evidence could include, but is not limited to:

- Documentation describing your business, such as business plans, reports, presentations, promotional materials, newspaper articles, web-site text, news copy, etc.
- A detailed description of the proffered position, to include approximate percentages of time for each duty the beneficiary will perform;
- Copies of written contractual agreements or work orders from each of the companies who will utilize the beneficiary's services to show the beneficiary will be performing duties of a specialty occupation;
- Documentation of how many other individuals in your establishment are currently, or were, employed in this position, supported by copies of the employees' degrees and evidence of employment such as pay stubs or Form W-2s, W-3s, or 1099s.

**Groups Being Held to Itinerary and Right To Control Requirements**

The following employers will be evaluated for right to control and itinerary:

- H-1B dependent IT employers offering an IT position at more than one possible work location
- IT employers offering an IT position that meets two of the three 10/25/10 criteria at more than one possible work location
- Employers identified in a Statement of Findings (SOF) who have benched employees or who do not have sufficient work available and there is more than one possible work location.
- All types of staffing companies*
- Other scenarios identified on a case by case basis and after consultation with a supervisor.

*Note: The main product of a staffing company is providing people solutions. A company that uses its own proprietary technology, methodologies, tools and instrumentalities to provide IT work solutions is not a staffing company.

Furthermore, right to control will not be applied to companies who develop and/or manufacture their own trademarked software, hardware components, or offer services related to the products they develop.

**Exception**: Right to control will not be applied to staffing companies in the business of staffing hospitals with physicians/hospitalists.

## Jowett, Haley L

**From:** Renaud, Daniel M
**Sent:** Wednesday, January 13, 2010 10:42 AM
**To:** Perkins, Robert M
**Subject:** FW: Final H1B Memo Materials
**Attachments:** H-1B QA Final.doc; H-1B ExecSumm H-1B Employer-Employee Memo.doc; H1B Employer-Employee Memo 1-8-10.pdf

fyi

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**From:** Velarde, Barbara Q
**Sent:** Wednesday, January 13, 2010 10:19 AM
**To:** Gregg, Bret S; Poulos, Christina; Renaud, Daniel M; Hazuda, Mark J
**Cc:** Johnson, Bobbie L; Young, Claudia F
**Subject:** FW: Final H1B Memo Materials

Before the call to hash through these changes, we don't expect any major shift in adjudication. The major change is that there is a requirement for the itinerary under certain circumstances but with regards to evidence required to establish the relationship we cannot hang our hat on you must give us a contract or we will deny. If we start swinging this way, we will be called to task. We need to focus on the totality of the evidence. I think our folks are very reasonable and will get it. Just wanting to make sure you get a sense of how your officers are interpreting this. We will be monitoring the blogs to see how stakeholders interpret as well because they might feel that they don't have to provide documents to establish the relationship, but clearly that is not what the memo says either. Thanks for all of your support.

Barbara Q. Velarde
Deputy Associate Director
Service Center Operations Directorate
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, Room 2134
Washington, DC 20529

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**From:** Johnson, Bobbie L
**Sent:** Wednesday, January 13, 2010 9:04 AM
**To:** Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
**Cc:** Velarde, Barbara Q; Neufeld, Donald; Kruszka, Robert F; Young, Claudia F
**Subject:** Final H1B Memo Materials

All,

We have completed our public outreach materials for the H1B memo, and all of the attached documents have been cleared for posting on the USCIS Website at 11 a.m. today. A Leadership Alert will be coming out shortly with the memo as well.

Please distribute all three attachments to your adjudications units. Also, we will be having a call to discuss this memo as soon as possible; if adjudicators have questions on the memo, please provide those to us in advance.

Thank you.

Bobbie

*Bobbie Johnson*

*Acting Branch Chief*
*Business Employment Services Team*
*Service Center Operations, USCIS*
[redacted]

(b)(6)

*Office of Communications*

U.S. Citizenship and Immigration Services

# Questions & Answers

January 13, 2009

## USCIS Issues Guidance Memorandum on Establishing the "Employee-Employer Relationship" in H-1B Petitions

**Introduction**

U.S. Citizenship and Immigration Services (USCIS) issued updated guidance to adjudication officers to clarify what constitutes a valid employer-employee relationship to qualify for the H-1B 'specialty occupation' classification. The memorandum clarifies such relationships, particularly as it pertains to independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. The memorandum is titled: "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)." In addition to clarifying the requirements for a valid employer-employee relationship, the memorandum also discusses the types of evidence petitioners may provide to 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.

**Questions & Answers**

**Q: Does this memorandum change any of the requirements to establish eligibility for an H-1B petition?**

*A:* No. This memorandum does not change any of the requirements for an H-1B petition. The H-1B regulations currently require that a United States employer establish that it has an employer-employee relations with respect to the beneficiary, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. In addition to demonstrating that a valid employer-employee relationship will exist between the petitioner and the beneficiary, the petitioner must continue to comply with all of the requirements for an H-1B petition including:

- establishing that the beneficiary is coming to the United States temporarily to work in a specialty occupation;
- demonstrating that the beneficiary is qualified to perform services in the specialty occupation; and
- filing of a Labor Condition Application (LCA) specific to each location where the beneficiary will perform services.

**Q: What factors does USCIS consider when evaluating the employer-employee relationship?**

*A:* As stated in the memorandum, USCIS will evaluate whether the petitioner has the "right to control" the beneficiary's employment, such as when, where and how the beneficiary performs the job. Please see the memorandum in the links in the upper right hand of this page for a list of factors that USCIS will review when determining whether the petitioner has the right to control the beneficiary. Please note that no one factor is decisive and adjudicators will review the totality of the circumstances when making a determination as to whether the employer-employee relationship exists.

**Q: What types of evidence can I provide to demonstrate that I have a valid employer-employee relationship with the beneficiary?**

*A*: You may demonstrate that you have a valid employer-employee relationship with the beneficiary by submitting the types of evidence outlined in the memorandum or similar probative types of evidence.

**Q: What if I cannot submit the evidence listed in the memorandum?**
*A:* The documents listed in the memorandum are only examples of evidence that establish the petitioner's right to control the beneficiary's employment. Unless a document is required by the regulations, i.e. an itinerary, you may provide similarly probative documents. You may submit a combination of any documents that sufficiently establish that the required relationship between you and the beneficiary exists. You should explain how the documents you are providing establish the relationship. Adjudicators will review and weigh all the evidence submitted to determine whether a qualifying employer-employee relationship has been established.

**Q: What if I receive or have received an RFE requesting that I submit a particular type of evidence and I do not have the exact type of document listed in the RFE?**
*A:* If the type of evidence requested in the RFE is not a document that required by regulations (e.g. an itinerary), you may submit other similar probative evidence that addresses the issue(s) raised in the RFE. You should explain how the documents you are providing address the deficiency(ies) raised in the RFE. Adjudicators will review and weigh all evidence based on the totality of the circumstances. Please note that you cannot submit similar evidence in place of documents required by regulation.

**Q: Will my petition be denied if I cannot establish that the qualifying employer-employee relationship will exist?**
*A:* If you do not initially provide sufficient evidence of an employer-employee relationship for the duration of the requested validity period, you may be given an opportunity to correct the deficiency in response to a request for evidence (RFE). Your petition will be denied if you do not provide sufficiently probative evidence that the qualifying employer-employee relationship will exist for any time period.

**Q: What if I can only establish that the qualifying employer-employee relationship will exist for a portion of the requested validity period?**
*A:* If you do not initially provide sufficient evidence of an employer-employee relationship for the duration of the requested validity period, you may be given an opportunity to correct the deficiency in response to a request for evidence (RFE). Your petition may still be approved if you provide evidence that a qualifying employer-employee relationship will exist for a portion of the requested validity period (as long as all other requirements are met), however, USCIS will limit petition's validity to the time period of qualifying employment established by the evidence.

**Q: What happens if I am filing a petition requesting a "Continuation of previously approved employment without change" or "Change in previously approved employment" and an extension of stay for the beneficiary in H-1B classification, but I did not maintain a valid employer-employee relationship with the beneficiary during the validity of the previous petition?**
*A:* Your extension petition will be denied if USCIS determines that you did not maintain a valid employer-employee relationship with the beneficiary throughout the validity period of the previous petition. The only exception is if there is a compelling reason to approve the new petition (e.g. you are able to demonstrate that you did not meet all of the terms and conditions through no fault of your own). Such exceptions would be limited and made on a case-by-case basis.

**Q: What if I am filing a petition requesting a "Change of Employer" and an extension of stay for the beneficiary's H-1B classification? Would my petition be adjudicated under the section of the memorandum that deals with extension petitions?**
*A:* No. The section of the memorandum that covers extension petitions applies solely to petitions filed by the same employer to extend H-1B status without a material change in the original terms of

employment. All other petitions will be adjudicated in accordance with the section of the memorandum that covers initial petitions.

**Q: I am a petitioner who will be employing the beneficiary to perform services in more than one work location. Do I need to submit an itinerary in support of my petition?**
*A:* Yes. You will need to submit a complete itinerary of services or engagements, as described in the memo, in order to comply with 8 CFR 214.2(h)(2)(i)(B) if you are employing the beneficiary to perform services in more than one work location. Furthermore, you must comply with Department of Labor regulations requiring that you file an LCA specific to each work location for the beneficiary.

**Q: What happens if I do not submit evidence of the employer-employee relationship with my initial petition?**
*A:* If you do not initially provide sufficient evidence of an employer-employee relationship for the duration of the requested validity period, you will be given an opportunity to correct the deficiency in response to a request for evidence (RFE). However, failure to provide this information with the initial submission will delay processing of your petition.

For more information on USCIS and its programs, visit www.uscis.gov or call 1-800-375-5283.

–USCIS –

# EXECUTIVE SUMMARY:
# DETERMINING EMPLOYER-EMPLOYEE RELATIONSHIP FOR ADJUDICATION OF H-1B PETITIONS, INCLUDING THIRD-PARTY SITE PLACEMENTS

On January 8, 2010, Don Neufeld, Associate Director, Service Center Operations, signed a memorandum entitled "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements: Additions to the Officer's Field Manual (AFM) Chapter 31.3(g)(15)(AFM Update 10-24)." This memorandum provides the following:

Summary:

Petitioners must establish they will have a valid employer-employee relationship with the beneficiary throughout the requested validity period for the H-1B petition. In addition, they must establish that the position being offered is a specialty occupation and that petitioners have complied with Department of Labor regulations by filing Labor Condition Applications (LCAs) specific to each location where the beneficiary will work.

- Adjudicators must review all the documentation contained in the petition and determine whether the petitioner will have the *right* to control the beneficiary's employment in order to ascertain whether the petitioner has established the employer-employee relationship.
- In assessing the requisite degree of control, adjudicators 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.

- The memorandum also lists a variety of factors that should be considered when evaluating the petitioner's right to control the beneficiary including, but not limited to:

    - Does the petitioner supervise the beneficiary
    - Does the petitioner have the right to control the beneficiary's work
    - Does the petitioner evaluate the work-product of the beneficiary
    - Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished.

- No one single factor to be considered is decisive. Adjudicators must review the *totality of the circumstances* to determine whether the petitioner has established its right to control the beneficiary's employment.

- To assist our officers, the memorandum also contains a number of scenarios both where valid employer-employee relationships exist and where valid employee-relationships do not exist. These are only examples and officers may, of course, see a wide-variety of situations and factors when reviewing an H-1B petition.

- It is important to note that this memorandum does not cover amended petitions. Further guidance is under consideration to clarify the requirement to file an amended petition if there is a material change in the terms of employment.

Key Sections:

- *Guidance for Initial H-1B Petitions*:
  - This section of the memorandum covers the types of evidence that could demonstrate a valid employer-employee relationship between the petitioner and the beneficiary in an initial H-1B petition. The examples in the memorandum include, but are not limited to:
    - A complete itinerary of services or engagements;
    - Signed Employment Agreement;
    - Relevant portions of valid contracts , statements of work, work orders, service agreements with end-user clients.

- *Guidance for Extension H-1B Petitions*:
  - This section of the memorandum covers the types of evidence that could be provided to demonstrate that the petitioner and beneficiary continue to have a valid employer-employee relationship in an extension H-1B petition. The examples in the memorandum include, but are not limited to:
    - Copies of the beneficiary's pay records;
    - Examples of work product created by the beneficiary;
    - Copies of employment history records.

  - The extension petition may be denied if the adjudicator determines that the petitioner failed to maintain the employer-employee relationship during the validity of the previous petition, unless there are compelling reasons to approve the new petition.

- Petitioners must submit a complete itinerary of services or engagements for the requested validity period of the petition if the beneficiary will be placed at more than one work location to perform services.

- The memorandum emphasizes that adjudicators must narrowly tailor their RFEs to address the specific deficiency(ies) in the petition and describe "illustrative" types of evidence that will go directly to curing the deficiency(ies). RFEs should not mandate that the petitioner submit a specific type of evidence unless that evidence is listed in regulations. RFEs also should not request information already contained in the petition.

## Jowett, Haley L

**From:** Chong, Jenny
**Sent:** Thursday, December 10, 2009 12:28 PM
**To:** #CSC Division I
**Subject:** H1B validity date issue

Hi.

When determining the "from" validity date, follow this general rule:

The "from" validity date of the petition should be the latest of the following:

- The date of adjudication/ the approval date
- The LCA "from" date; or
- The date requested by the petitioner.

Here are some exceptions only for Same Employer EOS petitions: (Backdate)

If the petition is marked **2/B**. Same employer- Continuation of previously approved employment without change, backdate the validity date to the day after the beneficiary's status expires to eliminate gaps.

If the petition is marked **2/C** -Change in previously approved employment (with Same Employer)- If the beneficiary's status has expired prior to the date of adjudication, 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.
If the beneficiary's status has not expired prior to the date of adjudication, then follow the general rule listed above.
DO NOT backdate if the petition is filed by a different employer.

If you have any questions please see your supervisors.

**Thank You.** 

**Jenny Chong** | **Supervisory Adjudications Officer** | Dept. of Homeland Security| USCIS | Laguna Niguel, CA 92677|

☎: [redacted] | 🖷: 949.389.8027 | ✉: jenny.chong@dhs.gov

(b)(6)

## Jowett, Haley L

**From:** Brokx, John B
**Sent:** Thursday, March 31, 2011 12:42 PM
**To:** Fierro, Joseph; Goodman, Lubirda L; Lee, Danielle L; Gooselaw, Kurt G; Sun, Catherina C; Steele, Jenny B
**Cc:** DeJulius, Robert W; Helfer, Wayne D; Phan, Lethuy; Mikhelson, Jack; Cameron, Felicia M
**Subject:** I-129, H-1B, Concurrent Employment, Validity Period NOT Limited

All,

In a recent inquiry it was asked whether a concurrent employer is given:

- the same validity period as the original employer; **OR**
- whatever validity period it requests up to the maximum period allowed?

The guidance below indicates that we cannot limit the validity period requested by a concurrent employer [up to the maximum allowed].

This email will be posted to **O:_Adjudications\I-129\H1B1\3-Reference Material\1-Beneficiary Issues\Concurrent Employment**

**NOTE: Further guidance is under consideration by OCC at the time of this message.**

---

**From:** Jepsen, Patricia A
**Sent:** Tuesday, April 15, 2008 2:40 PM
**To:** Canney, Keith J; Perkins, Robert M; Prince, Rose M; Gooselaw, Kurt G
**Cc:** Kane, Daniel J; Bouchard, Armanda M
**Subject:** phone conversation

Just spoke to VSC, we agreed that, given the OCC opinion that we cannot limit the approval time on a petition for an H-1B currently employed by an exempt petitioner seeking concurrent employment with a non-exempt employer, we will approve the non-exempt concurrent work for the full amount of time requested (and covered by the lca)

Patricia Jepsen
Adjudications Officer
Service Center Operations
U.S. Citizenship and Immigration Services
Department of Homeland Security
P: [redacted]
F: (202) 272-1398

(b)(6)

## Jowett, Haley L

**From:** Brokx, John B
**Sent:** Thursday, March 31, 2011 12:50 PM
**To:** 'Brokx, John B'
**Subject:** I-129, H-1B, Concurrent employment, Validity Period NOT limited

----- Original Message -----
From: Haskell, Alexandra P
To: Cummings, Kevin J; Williams, Carol L
Cc: Cox, Sophia; Velarde, Barbara Q; Kruszka, Robert F
Sent: Mon Feb 09 17:27:59 2009
Subject: RE: Cap - concurrent employment issue

Hi Kevin,

This looks correct to me. My understanding is that we will give the full period of time requested if the alien is eligible (we will not approve for a period of time beyond the statutory limitation of stay or AC21 extension time, etc.) However, the alien must demonstrate that s/he continues to be employed by the cap-exempt employer for any further extensions.

Thanks,

Sasha

Alexandra P. Haskell
Adjudications Officer
USCIS SCOPS Business & Trade Services
Phone [redacted]
Fax: (802) 288-7833 (b)(6)

-----Original Message-----
From: Cummings, Kevin J
Sent: Monday, February 09, 2009 5:17 PM
To: Williams, Carol L; Haskell, Alexandra P
Cc: Cox, Sophia; Velarde, Barbara Q; Kruszka, Robert F
Subject: Fw: Cap - concurrent employment issue

Carol and/or Sasha,

I think that the responses below are accurate. Can you please confirm? Thanks.

--Kevin

From: Gooselaw, Kurt G
Sent: Monday, February 09, 2009 1:59 PM
To: Gregg, Bret S
Subject: RE:

Bret,

The latest on this is from the 5/30/08 AC21 memo pages 7-8:

Also this memo does not provide the timeframe for concurrent employment. HQ has advised to give the full three year period if eligible, notwithstanding the length of time given on the exempt employer.

Pursuant to the provisions of INA §214(g)(6), USCIS does not require that an alien who is cap- exempt by virtue of the above types of employment, be counted towards the limitation contained in 214(g)(1)(a) if they accept concurrent employment with a non-exempt employer. INA §214(g)(6) reads as follows:

Any alien who ceases to be employed by an employer described in paragraph (5)(A) shall, if employed as a nonimmigrant alien described in section 1101(a)(15)(H)(i)(b) of this title, who has not previously been counted toward the numerical limitations contained in paragraph (1)(A), be counted toward those limitations the first time the alien is employed by an employer other than one described in paragraph (5). (Emphasis added.)

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.

At the time of filing of a concurrent employment H-1B petition that is subject to the numerical limitation of 214(g)(1)(a):

a. If the H-1B alien beneficiary has not "ceased" to be employed in a cap-exempt position pursuant to INA § 214(g)(5)(A) and (B), then he or she will not be counted towards the cap.

b. If the H-1B alien beneficiary has "ceased" to be employed in a cap-exempt position, then the alien will be subject to the H-1B numerical limitation, and the concurrent employment petition may not be approved unless a cap number is available to the alien beneficiary.

c. If USCIS determines that an H-1B alien beneficiary has ceased to be employed in a cap-exempt position after a new cap-subject H-1B petition has been approved on his or her behalf, USCIS will deny any subsequent cap-subject H-1B petition filed on behalf of the H-1B alien beneficiary if no cap numbers are available.

---

From: Gregg, Bret S
Sent: Monday, February 09, 2009 11:20 AM
To: Gooselaw, Kurt G
Subject:

Kurt,

We spoke with Kathy Grzegorek today and she had a few questions and these may also come up in Seattle:

#1 What are the cap implications if someone is working for an exempt petitioner and seeks concurrent employment with a non-exempt petitioner?

#2 What happens in scenario 1 where they quit the exempt petitioner and want to remain working for the non-exempt? Are they then subject to the cap?

Please explain so I can forward the answers to her. I'll get you a CSC update today to bring to Seattle.

## Jowett, Haley L

**From:** Gooselaw, Kurt G
**Sent:** Tuesday, April 27, 2010 10:54 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:** Phan, Lethuy
**Sent:** Friday, March 02, 2012 6:48 PM
**To:** Chong, Jenny
**Subject:** ONET and OOH
**Attachments:** 20120117131943515.pdf

I remember we talked about ONET and OOH. Attached is the AAO's decision that disregards the use of ONET on specialty occupation issue. FYI

## Jowett, Haley L

**From:** Sweeney, Shelly A
**Sent:** Wednesday, February 24, 2010 12:57 PM
**To:** Nguyen, Carolyn Q; Perkins, Robert M; Gooselaw, Kurt G
**Cc:** Velarde, Barbara Q; Young, Claudia F; Johnson, Bobbie L; Doherty, Shannon P
**Subject:** RE: Employer-Employee Memo- Cognizant
**Attachments:** H1B Memo Questions OCC Cleared 2-24-10.doc

Please see attached responses regarding questions that came up during/after our teleconference on the employer-employee memo.

---

**From:** Nguyen, Carolyn Q
**Sent:** Tuesday, February 23, 2010 4:06 PM
**To:** Perkins, Robert M; Johnson, Bobbie L
**Cc:** Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
**Subject:** RE: Employer-Employee Memo- Cognizant

Hi,

Are we on status quo for Cognizant cases or are we to apply the memo and require the establishment of the employer-employee relationship throughout the period requested?

Thanks.

---

**From:** Perkins, Robert M
**Sent:** Wednesday, February 17, 2010 10:55 AM
**To:** Nguyen, Carolyn Q; Johnson, Bobbie L
**Cc:** Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
**Subject:** RE: Employer-Employee Memo- Cognizant

I believe this was a SCOPS action item following our conference call on January 20th....VSC has remained "status quo" while waiting further clarification on this issue. On a related note, attached are the RFE templates (view in print layout) that we intend to start utilizing as a result of the employer-employee memo.

Rob

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**From:** Nguyen, Carolyn Q
**Sent:** Tuesday, February 16, 2010 6:35 PM
**To:** Young, Claudia F; Johnson, Bobbie L
**Cc:** Perkins, Robert M; Gooselaw, Kurt G
**Subject:** FW: Employer-Employee Memo- Cognizant

Hi,

Just wanted to give you a heads up....the new memo dated 01/08/2010 states that a petitioner must establish that there exists a valid employer-employee relationship throughout the requested H-1B period. This may be a change on the validity period for some of the Cognizant cases.

Thanks.

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**From:** Devera, Jennie F
**Sent:** Wednesday, February 10, 2010 4:08 PM
**To:** Nguyen, Carolyn Q
**Subject:** Employer-Employee Memo- Cognizant

Hi, Carolyn,

Does the 1/8/10 "Employer-Employee" memo change the way we are reviewing Cognizant cases?

- Prior to the memo if they did not provide a contract end-date or the estimated end-date is speculative, we have been giving them one year validity date. I understand that we will no longer assign **one-year** validity date on cases that have less than a year contract. The case will be granted for time that they can prove. We will give them the benefit of an RFE before limiting the validity dates.
- To establish an employer-employee relationship, page 8 of the memo provides a list of documentation that can be provided. However, on Cognizant filings, at a minimum we will take a statement from them which identifies the end-client.

Please confirm if these are correct.

Thanks

Jennie

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**From:** Nguyen, Carolyn Q
**Sent:** Monday, June 22, 2009 1:53 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: Cognizent

Although the guidance below is specific to Cognizant cases, it will probably be adopted for other off-site H-1B employment and the L-1B specialized knowledge cases. We'll get confirmation this week. Thanks.

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**From:** Gregg, Bret S
**Sent:** Monday, June 22, 2009 1:45 PM
**To:** Nguyen, Carolyn Q; Gooselaw, Kurt G
**Cc:** Chau, Anna K; Poulos, Christina
**Subject:** FW: Cognizent

Carolyn/Kurt – please advise your divisions. I assume this is the same approach we will take with similar companies and can discuss with Barbara tomorrow. Thanks

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**From:** Kruszka, Robert F
**Sent:** Monday, June 22, 2009 11:18 AM
**To:** Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
**Cc:** Williams, Carol L; Cummings, Kevin J; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q
**Subject:** FW: Cognizent

Don and Barbara met with Mike Aytes on Friday regarding the Cognizant cases.
Their discussion focused on the H1B and L1B scenarios and Mike articulated the following expectations:

**H1B:** On an initial filing since Cognizant is an H1B dependant company and also engages in 3rd party contracting. At a minimum there needs to be an LCA specific to the location where the beneficiary will be working, documentation that clearly outlines the duties and documentation that identifies the third party employer. He stated his support in obtaining this documentation but said it didn't have to be specifically contained within a contract. So it would appear the documentation CSC just received while arguably sufficient for purposes of identifying specialty occupation work at a third party site, the LCA for a different geographical area would be a disqualifier. Mike agrees the LCA on record must comport with the identified third party employment site

**H1B Extensions:** W2 or other appropriate wage documents are necessary to establish that the beneficiary maintained status. A contract or similar documentation as above is appropriate to support the offer of employment as well as the LCA requirement given the fact that Cognizant contracts out.

**L1B:** Initial filings need to appropriately evidence the specialized knowledge requirement and beneficiary's qualifications. He indicated a level of concern with 3rd party employer scenarios being able to meet the L1B standard per the Visa Reform when the beneficiary's specialized knowledge is specific to the petitioner not clear how that translates to the 3rd party employer. Evidence must be provided to show that Cognizant rather than the end client will exert control over the beneficiary.

**L1B: Extensions:** We generally will not re adjudicate the initial finding regarding the beneficiary's specialized knowledge. We generally will defer to the past adjudication when the present duties at the extension phase are essentially the same as those outlined in the initial filing. However, given the fact that Cognizant is involved in supporting offsite employment, even at the extension phase sufficient documentation must be provided to detail and show that Cognizant rather than the end client will exert control over the beneficiary. In addition, to determine maintenance of status, appropriate wage documents may be requested.

The bottom line is if we did not apply the proper L1B specialized knowledge standard at the time of the initial decision, we will not revisit it unless there was misrepresentation in the initial filing. We have to make the right decision the first time and folks will be able to rely to a substantial degree on that initial finding. These types of cases will over time become less of an issue since the post Visa Reform standard is now the norm.

Guidance on the general adjudication's standard relative to the L1B specialized knowledge extension cases will be forthcoming. However, please use this email in focusing the adjudication of these cases. Please let me know if a call is needed and as always feel free to pose any follow up questions.

Thank you as always for your continued cooperation and support

QUESTION: For in-house work assignments will we accept the petitioner's statement regarding the work assignment or can we request evidence to validate the petitioner's claim? For example, the beneficiary will work on a project at the petitioner's location. The petitioner indicates the project is for their client Whirlpool. Can we request documentation that serves as evidence of the agreement between the petitioner and Whirlpool? We would probably avoid this line of questioning with large well known companies, however I have concerns that the small IT staffing-type companies will try to make the in-house claim after receiving an rfe for an itinerary and right to control, when in reality they probably don't have facilities to house their workers. Many of these small IT staffing companies have mail and phone services at an office building, without renting space (aka a virtual office).

DRAFT RESPONSE: If an adjudicator is not satisfied with the evidence submitted by the petitioner to establish that a valid employer-employee relationship will exist when the beneficiary is placed at an in-house work assignment, the adjudicator may request additional evidence as needed. Please remember, you cannot specifically require submission of a particular type of document unless it is required by regulations.

QUESTION: How much time do we provide for a validity period if there is evidence of an employer-employee relationship for less than one year?

RESPONSE: If sufficient evidence of an employer-employee relationship for the duration of the requested validity period is not demonstrated, you may issue an RFE to give the petitioner the opportunity to correct the deficiency. If the response to the RFE still does not demonstrate an employer-employee relationship for the entire period requested then a validity period of no less than one year (but up to the duration of the period of time that a valid employer-employee relationship has been established) may be granted if the petitioner establishes the employer-employee relationship for a period of time less than the validity period requested as long as:

- the petition is otherwise approvable;
- the beneficiary will not exceed the maximum allowable period of time in H-1B status (or under AC21); and
- the LCA is valid for that period of time.

QUESTION: If the petitioner is an IT consulting firm and there is evidence of an in-house project for one year, but three years is requested, do we give the one year or the three years?

DRAFT RESPONSE: The petition may be approved for the duration of time in which an employer-employee relationship has been demonstrated (please see the response above for further information).

QUESTION: On page 3 at the bottom, the third fact is, "Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?" I keep getting tripped on the last clause, "if such control is required". Do you know what this is saying/asking?

DRAFT RESPONSE: We interpret this as referring back to the phrase "day-to-day basis". As mentioned later in the memo, adjudicators are to keep the nature of the business in mind when reviewing the petition. If the nature of the occupation would require supervision and control on a day-to-day basis, then the petitioner should be able to demonstrate the "right to control" the beneficiary's work on a day-to-day basis.

## Jowett, Haley L

**From:** Fierro, Joseph
**Sent:** Thursday, March 03, 2011 10:34 AM
**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:** RE: H-1B Guidance for consistency of adjudication

All:

Please be aware that SCOPS will continue to review all IBMi decisions before they go out until further notice. Therefore, please continue to forward all IBMi cases to
WS 523

Erik Elias is the supervisory POC in the division if you have any questions.

Thanks,

Joe

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**From:** Fierro, Joseph
**Sent:** Tuesday, March 01, 2011 1:16 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

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**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]

**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.

(b)(5)

**Third-party placements**

[redacted]

[redacted]

**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

## Jowett, Haley L

**From:** Gooselaw, Kurt G
**Sent:** Wednesday, March 10, 2010 11:58 AM
**To:** Nguyen, Carolyn Q
**Subject:** RE: AILA H-1B Questions

Where there is an evaluation from a college or university issuing an evaluation based on training and/or experience, the author must present evidence that they are in a position to grant college level credit. They may be a recognized authority but may not be able to grant college level credit. Unless it has been demonstrated that these evaluators are in that position of authority to grant, the evaluation will not be considered.

Regarding independent evaluators, we do see evaluations combining education with training and/or experience and make a determination that the combination is equivalent to a degree. Evaluators in these situations can only evaluate education. Should we receive evidence from recognized experts regarding training and/or experience we review and USCIS makes a determination whether the education evaluation coupled with the recognized authority letters meet the degree requirement.

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**From:** Nguyen, Carolyn Q
**Sent:** Wednesday, March 10, 2010 9:35 AM
**To:** Sweeney, Shelly A
**Cc:** Gooselaw, Kurt G
**Subject:** FW: AILA H-1B Questions

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**From:** Elias, Erik Z
**Sent:** Tuesday, March 09, 2010 7:46 AM
**To:** Nguyen, Carolyn Q
**Subject:** FW: AILA H-1B Questions

I don't think the officers are discounting the evaluator's opinion just because he/she is paid for it. I've never seen that language in a denial or RFE. What I typically see are letters written by recognized authorities (usually a college professor) detailing how the beneficiary has expertise in the field. The writer typically meets the definition of a "recognized authority". However, the petitioner, at times, fails to establish that the beneficiary's training and/or work experience included "...the theoretical and practical application of specialized knowledge required by the specialty occupation...[and]...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..." Experience letters are usually general in nature ("Beneficiary was employed as a software engineer from mm/dd/yyyy – mm/dd/yyyy. His performance was good.") No details are given about the work the beneficiary performed, who the beneficiary worked with or if those individuals have a degree or equivalent in the specialty.

Regarding brief periods of stay as a visitor for business or pleasure I agree with the response that was provided. Brief trips are not interruptive of the one year requirement but should not be counted toward time spent outside the United States. I feel the regulation is pretty clear.

---

**From:** Nguyen, Carolyn Q
**Sent:** Monday, March 08, 2010 4:11 PM

**To:** Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Harvey, Mark E
**Subject:** FW: AILA H-1B Questions

Hi,

May I get your take on these scenarios and what we see on the floor?

Are we saying that because these individuals get paid for their evaluations, we are discounting their opinion?

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

Do the letters referenced below also lack a mention that these individuals have the authority to grant college level credit or are we discounting the evaluations because they simply do not indicate that they were done on behalf of the university?

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."

Thanks.

---

**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

## Jowett, Haley L

**From:** Gooselaw, Kurt G
**Sent:** Monday, July 06, 2009 10:46 AM
**To:** Nguyen, Carolyn Q; Perkins, Robert M
**Subject:** RE: Cognizent

As far as I understood we are to request documentation that outlines the beneficiary's location and work assignment either through an end user agreement or the pertinent parts of the petitioner's contract with the end user if they are H1B dependent, 10/25/10, etc. The discussion where the petitioner will just identify the end user was discussed but how that would apply was unclear. In the absence of any formal guidance we are still proceeding with our current procedure as identified above. Unless the agreement or other documentation is clear on the time requested, we will give one year. Example: If the validity period is unclear such as the petitioner requesting 2 - 3 years, as we have been seeing, SCOPS agreed that we should be giving 1 year. If less than one year identified, then 1 year as well.

---

**From:** Nguyen, Carolyn Q
**Sent:** Monday, July 06, 2009 8:28 AM
**To:** Perkins, Robert M; Gooselaw, Kurt G
**Subject:** RE: Cognizent

Funny, Kurt questioned me on that as well.

Below was Bret's message when he forwarded Robert's guidance to us. Since I went on leave before Barbara came out here, I don't know what was discussed though I would think it would be applied across the board.

Kurt - did Barbara discuss this when she was out here? Was the validity period mentioned? Thanks.

---

**From:** Gregg, Bret S
**Sent:** Monday, June 22, 2009 1:45 PM
**To:** Nguyen, Carolyn Q; Gooselaw, Kurt G
**Cc:** Chau, Anna K; Poulos, Christina
**Subject:** FW: Cognizent

Carolyn/Kurt – please advise your divisions. I assume this is the same approach we will take with similar companies and can discuss with Barbara tomorrow. Thanks

---

**From:** Perkins, Robert M
**Sent:** Monday, July 06, 2009 8:23 AM
**To:** Nguyen, Carolyn Q; Gooselaw, Kurt G
**Subject:** RE: Cognizent

Thanks...is that how you are now proceeding with other staffing agencies as well?

Rob

---

**From:** Nguyen, Carolyn Q
**Sent:** Monday, July 06, 2009 11:21 AM
**To:** Perkins, Robert M; Gooselaw, Kurt G
**Subject:** RE: Cognizent

Hi Rob,

For Cognizant cases, we are following the guidance below and interpreting it as requiring just identification of a third party. We do not require that the letter be from the end user.

Thanks.

---

**From:** Perkins, Robert M
**Sent:** Monday, July 06, 2009 5:21 AM
**To:** Nguyen, Carolyn Q; Gooselaw, Kurt G
**Subject:** FW: Cognizent

Quick question...for H1B initial filings, are you accepting a letter from the petitioner as sufficient to meet the area highlighted in green below or are you requiring documentation from the end user? As I alluded to in the attached E-mail string, we are still requiring evidence from the end user.

Thanks,

Rob

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**From:** Velarde, Barbara Q
**Sent:** Thursday, July 02, 2009 3:16 PM
**To:** Cummings, Kevin J; Hazuda, Mark J
**Cc:** Perkins, Robert M; Kane, Daniel J; Kruszka, Robert F
**Subject:** RE: Cognizent

With regards to the question posed at the end of the email: for now yes on extensions the issue of specialized knowledge should only be revisited if there was misrepresentation in the initial filing or a change in the nature of the duties or change in position. Working for a new third party would trigger the review.

Barbara Q. Velarde
Chief, Service Center Operations
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, Room 2132
Washington, DC 20529

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**From:** Cummings, Kevin J
**Sent:** Thursday, July 02, 2009 1:58 PM
**To:** Hazuda, Mark J
**Cc:** Perkins, Robert M; Kane, Daniel J; Kruszka, Robert F; Velarde, Barbara Q
**Subject:** RE: Cognizent

Perfect, Mark. Thanks.

--Kevin

Kevin J. Cummings
Branch Chief, Business & Trade Services
USCIS Service Center Operations
Department of Homeland Security

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**From:** Hazuda, Mark J
**Sent:** Thursday, July 02, 2009 1:51 PM
**To:** Cummings, Kevin J

**Cc:** Perkins, Robert M; Kane, Daniel J
**Subject:** RE: Cognizent

Kevin,

Sorry for the delay,

Here are the responses for the H1B cap and EOS Cognizant scenarios...the informal guidance has had no impact with the H1B petitions, as it is consistent with how we were previously processing these petitions.

**H1B Cap** – To date, Cognizant has identified the city/state where the beneficiary will purportedly be employed, but has failed to identify the actual client (third party) where the beneficiary will provide services. The language in the denials (done prior to SCOPS meeting with Mike) does allude to contracts. However, Cognizant was also afforded the opportunity to submit statements of work, work orders, service agreements, and/or letters from authorized officials of the ultimate end client companies and has failed to do so.

**H1B EOS** – VSC requires a letter from the end client requiring (see exemplar attached):

- The name of the project the beneficiary is assigned to;
- Whether there is a vendor through whom the beneficiary's services are provided;
- The name of the vendor, if applicable;
- Whether the end client or the vendor supervises the beneficiary;
- The name, title, and contact information of the person who primarily supervises or will supervise the beneficiary at the work site; and
- Whether the work site has the ability to assign the beneficiary to a different employer.

With respect to the L1B questions we are currently adjudicating these petitions in the following manner:

**L1B Initials:** In general the two major areas of concern with the initial filings are:

1) Specialized knowledge- VSC is reviewing files for evidence of the beneficiary's specialized knowledge of the petitioning organization's products or services and that the position requires specialized knowledge. The beneficiary's specialized knowledge must be specific to that of the petitioner. If the beneficiary's specialized knowledge is specific to the 3rd party, the beneficiary would be ineligible for the L1B classification and the petition would be denied.
1) Control and supervision of the offsite beneficiary- If the beneficiary is stationed primarily at the worksite of an unaffiliated employer and the alien is principally under the control and supervision of the unaffiliated employer the petition will be denied under the provisions of the 2004 Reform Act.

**L1B Extensions:**

VSC has been having our officers take a hard look at all L1B extensions with respect to the issue of specialized knowledge and the 2004 Reform Act provisions. Due to a variety of reasons (AAO decisions, evolving understandings of the computer industry, 2004 Reform Act guidance, etc.) that have been recently confirmed in recent meetings with petitioners such as IBM, we have made the determination that the beneficiaries do not possess specialized knowledge of the petitioner's organization products or services. In fact over time we have determined that many of these beneficiaries actually only have a basic or very common level of knowledge and do not qualify for the L1B classification.

We do understand that this manner of adjudication impacts the expectations of businesses filing L1B extension petitions. Although VSC has been looking at the issue of specialized knowledge on certain L1B extensions, over time it is anticipated that this will become less of an issue at the extension phase.

We would like SCOPS/BOSS to confirm that VSC should only revisit the issue of specialized knowledge on extensions if it is found there was misrepresentation in the initial filing or the nature or duties of the position change. Examples of changes would include things such as working for a different third party at the time of extension or that the natures of the duties are changing.

Thanks,

**Mark J. Hazuda**
Deputy Director, Vermont Service Center
US Citizenship and Immigration Services

**From:** Cummings, Kevin J
**Sent:** Thursday, July 02, 2009 1:48 PM
**To:** Gregg, Bret S
**Cc:** Devera, Jennie F; Nguyen, Carolyn Q; Gooselaw, Kurt G; Williams, Carol L; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q; Kruszka, Robert F; Poulos, Christina; Renaud, Daniel M; Hazuda, Mark J
**Subject:** RE: Cognizent

Thank you, Bret. VSC?

--Kevin

Kevin J. Cummings
Branch Chief, Business & Trade Services
USCIS Service Center Operations
Department of Homeland Security

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**From:** Gregg, Bret S
**Sent:** Wednesday, July 01, 2009 6:55 PM
**To:** Cummings, Kevin J
**Cc:** Devera, Jennie F; Nguyen, Carolyn Q; Gooselaw, Kurt G; Williams, Carol L; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q; Kruszka, Robert F; Poulos, Christina; Renaud, Daniel M; Hazuda, Mark J
**Subject:** FW: Cognizent

For CSC - Thanks

---

**From:** Devera, Jennie F
**Sent:** Wednesday, July 01, 2009 3:53 PM
**To:** Gregg, Bret S
**Cc:** Nguyen, Carolyn Q
**Subject:** RE: Cognizent

Bret,

Yes, we are following the guidance below. Attached is a list of the Cognizant cases we've approved so far. We are still seeing cases where the proposed place of employment does not match with the LCA. These are being denied.

Thanks

Jennie

---

**From:** Gregg, Bret S
**Sent:** Wednesday, July 01, 2009 3:21 PM
**To:** Devera, Jennie F
**Subject:** FW: Cognizent

We don't really get L's from them but what are we seeing with H's and are we following the below for cognizant? Thanks

---

**From:** Cummings, Kevin J
**Sent:** Wednesday, July 01, 2009 12:06 PM
**To:** Kruszka, Robert F; Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
**Cc:** Williams, Carol L; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q
**Subject:** RE: Cognizent

VSC and CSC:

Please see the e-mail below from Robert once again. Can you please confirm whether you are following the admittedly informal guidance outlined below at present? If so, how is this impacting what you have been doing previously in relation to the scenarios listed below?

Finally, are the Cognizant cases still being denied by both CSC and VSC? Thanks.

--Kevin

Kevin J. Cummings
Branch Chief, Business & Trade Services
USCIS Service Center Operations
Department of Homeland Security

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**From:** Kruszka, Robert F
**Sent:** Monday, June 22, 2009 2:18 PM
**To:** Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
**Cc:** Williams, Carol L; Cummings, Kevin J; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q
**Subject:** FW: Cognizent

Don and Barbara met with Mike Aytes on Friday regarding the Cognizant cases. Their discussion focused on the H1B and L1B scenarios and Mike articulated the following expectations:

**H1B:** On an initial filing since Cognizant is an H1B dependant company and also engages in 3rd party contracting. At a minimum there needs to be an LCA specific to the location where the beneficiary will be working, documentation that clearly outlines the duties and documentation that identifies the third party employer. He stated his support in obtaining this documentation but said it didn't have to be specifically contained within a contract. So it would appear the documentation CSC just received while arguably sufficient for purposes of identifying specialty occupation work at a third party site, the LCA for a different geographical area would be a disqualifier. Mike agrees the LCA on record must comport with the identified third party employment site

**H1B Extensions:** W2 or other appropriate wage documents are necessary to establish that the beneficiary maintained status. A contract or similar documentation as above is appropriate to support the offer of employment as well as the LCA requirement given the fact that Cognizant contracts out.

**L1B:** Initial filings need to appropriately evidence the specialized knowledge requirement and beneficiary's qualifications. He indicated a level of concern with 3rd party employer scenarios being able to meet the L1B standard per the Visa Reform when the beneficiary's specialized knowledge is specific to the petitioner not clear how that translates to the 3rd party employer. Evidence must be provided to show that Cognizant rather than the end client will exert control over the beneficiary.

**L1B: Extensions:** We generally will not re adjudicate the initial finding regarding the beneficiary's specialized knowledge. We generally will defer to the past adjudication when the present duties at the extension phase are essentially the same as those outlined in the initial filing. However, given the fact that Cognizant is involved in supporting offsite employment, even at the extension phase sufficient documentation must be provided to detail and show that Cognizant rather than the end client will exert control over the beneficiary. In addition, to determine maintenance of status, appropriate wage documents may be requested.

The bottom line is if we did not apply the proper L1B specialized knowledge standard at the time of the initial decision, we will not revisit it unless there was misrepresentation in the initial filing. We have to make the right decision the first time and folks will be able to rely to a substantial degree on that initial finding. These types of cases will over time become less of an issue since the post Visa Reform standard is now the norm.

Guidance on the general adjudication's standard relative to the L1B specialized knowledge extension cases will be forthcoming. However, please use this email in focusing the adjudication of these cases. Please let me know if a call is needed and as always feel free to pose any follow up questions.

Thank you as always for your continued cooperation and support

## Jowett, Haley L

**From:** Sweeney, Shelly A
**Sent:** Wednesday, February 24, 2010 12:57 PM
**To:** Nguyen, Carolyn Q; Perkins, Robert M; Gooselaw, Kurt G
**Cc:** Velarde, Barbara Q; Young, Claudia F; Johnson, Bobbie L; Doherty, Shannon P
**Subject:** RE: Employer-Employee Memo- Cognizant
**Attachments:** H1B Memo Questions OCC Cleared 2-24-10.doc

Please see attached responses regarding questions that came up during/after our teleconference on the employer-employee memo.

---

**From:** Nguyen, Carolyn Q
**Sent:** Tuesday, February 23, 2010 4:06 PM
**To:** Perkins, Robert M; Johnson, Bobbie L
**Cc:** Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
**Subject:** RE: Employer-Employee Memo- Cognizant

Hi,

Are we on status quo for Cognizant cases or are we to apply the memo and require the establishment of the employer-employee relationship throughout the period requested?

Thanks.

---

**From:** Perkins, Robert M
**Sent:** Wednesday, February 17, 2010 10:55 AM
**To:** Nguyen, Carolyn Q; Johnson, Bobbie L
**Cc:** Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
**Subject:** RE: Employer-Employee Memo- Cognizant

I believe this was a SCOPS action item following our conference call on January 20th....VSC has remained "status quo" while waiting further clarification on this issue. On a related note, attached are the RFE templates (view in print layout) that we intend to start utilizing as a result of the employer-employee memo.

Rob

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**From:** Nguyen, Carolyn Q
**Sent:** Tuesday, February 16, 2010 6:35 PM
**To:** Young, Claudia F; Johnson, Bobbie L
**Cc:** Perkins, Robert M; Gooselaw, Kurt G
**Subject:** FW: Employer-Employee Memo- Cognizant

Hi,

Just wanted to give you a heads up....the new memo dated 01/08/2010 states that a petitioner must establish that there exists a valid employer-employee relationship throughout the requested H-1B period. This may be a change on the validity period for some of the Cognizant cases.

Thanks.

---

**From:** Devera, Jennie F
**Sent:** Wednesday, February 10, 2010 4:08 PM
**To:** Nguyen, Carolyn Q
**Subject:** Employer-Employee Memo- Cognizant

Hi, Carolyn,

Does the 1/8/10 "Employer-Employee" memo change the way we are reviewing Cognizant cases?

- Prior to the memo if they did not provide a contract end-date or the estimated end-date is speculative, we have been giving them one year validity date. I understand that we will no longer assign **one-year** validity date on cases that have less than a year contract. The case will be granted for time that they can prove. We will give them the benefit of an RFE before limiting the validity dates.
- To establish an employer-employee relationship, page 8 of the memo provides a list of documentation that can be provided. However, on Cognizant filings, at a minimum we will take a statement from them which identifies the end-client.

Please confirm if these are correct.

Thanks

Jennie

---

**From:** Nguyen, Carolyn Q
**Sent:** Monday, June 22, 2009 1:53 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: Cognizent

Although the guidance below is specific to Cognizant cases, it will probably be adopted for other off-site H-1B employment and the L-1B specialized knowledge cases. We'll get confirmation this week. Thanks.

---

**From:** Gregg, Bret S
**Sent:** Monday, June 22, 2009 1:45 PM
**To:** Nguyen, Carolyn Q; Gooselaw, Kurt G
**Cc:** Chau, Anna K; Poulos, Christina
**Subject:** FW: Cognizent

Carolyn/Kurt – please advise your divisions. I assume this is the same approach we will take with similar companies and can discuss with Barbara tomorrow. Thanks

---

**From:** Kruszka, Robert F
**Sent:** Monday, June 22, 2009 11:18 AM
**To:** Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
**Cc:** Williams, Carol L; Cummings, Kevin J; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q
**Subject:** FW: Cognizent

Don and Barbara met with Mike Aytes on Friday regarding the Cognizant cases. Their discussion focused on the H1B and L1B scenarios and Mike articulated the following expectations:

**H1B:** On an initial filing since Cognizant is an H1B dependant company and also engages in 3rd party contracting. At a minimum there needs to be an LCA specific to the location where the beneficiary will be working, documentation that clearly outlines the duties and documentation that identifies the third party employer. He stated his support in obtaining this documentation but said it didn't have to be specifically contained within a contract. So it would appear the documentation CSC just received while arguably sufficient for purposes of identifying specialty occupation work at a third party site, the LCA for a different geographical area would be a disqualifier. Mike agrees the LCA on record must comport with the identified third party employment site

**H1B Extensions:** W2 or other appropriate wage documents are necessary to establish that the beneficiary maintained status. A contract or similar documentation as above is appropriate to support the offer of employment as well as the LCA requirement given the fact that Cognizant contracts out.

**L1B:** Initial filings need to appropriately evidence the specialized knowledge requirement and beneficiary's qualifications. He indicated a level of concern with 3rd party employer scenarios being able to meet the L1B standard per the Visa Reform when the beneficiary's specialized knowledge is specific to the petitioner not clear how that translates to the 3rd party employer. Evidence must be provided to show that Cognizant rather than the end client will exert control over the beneficiary.

**L1B: Extensions:** We generally will not re adjudicate the initial finding regarding the beneficiary's specialized knowledge. We generally will defer to the past adjudication when the present duties at the extension phase are essentially the same as those outlined in the initial filing. However, given the fact that Cognizant is involved in supporting offsite employment, even at the extension phase sufficient documentation must be provided to detail and show that Cognizant rather than the end client will exert control over the beneficiary. In addition, to determine maintenance of status, appropriate wage documents may be requested.

The bottom line is if we did not apply the proper L1B specialized knowledge standard at the time of the initial decision, we will not revisit it unless there was misrepresentation in the initial filing. We have to make the right decision the first time and folks will be able to rely to a substantial degree on that initial finding. These types of cases will over time become less of an issue since the post Visa Reform standard is now the norm.

Guidance on the general adjudication's standard relative to the L1B specialized knowledge extension cases will be forthcoming. However, please use this email in focusing the adjudication of these cases. Please let me know if a call is needed and as always feel free to pose any follow up questions.

Thank you as always for your continued cooperation and support

**Jowett, Haley L**

**From:** Gooselaw, Kurt G
**Sent:** Thursday, November 19, 2009 4:11 PM
**To:** Nguyen, Carolyn Q
**Subject:** RE: H-1B

yes

---

**From:** Nguyen, Carolyn Q
**Sent:** Thursday, November 19, 2009 1:33 PM
**To:** Gooselaw, Kurt G
**Subject:** RE: H-1B

How about this? I will send it our when we get the revised RFE.

---

Hi,

With Kurt's concurrence and in an effort to produce consistency in our adjudication, the following guidance should be used until we receive an official policy memorandum from SCOPS or DOMO.

The four criteria for requesting additional documentation will remain the same as below. However, in lieu of contracts, we will accept letters from the authorized officials of the ultimate end-user clients where the specialty occupation will be performed. The letter(s) must include detailed description of the duties to be performed by the beneficiary. It must be established that a specialty occupation exists for the full period requested.

Attached is a revised RFE for your use. Please remove any items from the RFE template that have already been submitted with the petition.

Please see your supervisor if you have questions.

Thanks.

Carolyn & Kurt

---

**From:** Nguyen, Carolyn Q
**Sent:** Thursday, May 28, 2009 9:53 AM
**To:** #CSC Division I
**Cc:** Gooselaw, Kurt G; Nguyen Ho, Lynn
**Subject:** H-1B

Hi,

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.

## Jowett, Haley L

**From:** Gooselaw, Kurt G
**Sent:** Wednesday, March 31, 2010 12:48 PM
**To:** Steele, Jenny B
**Cc:** Wolcott, Rachel A; Torres, Lory C; Dyson, Howard E; Dela Cruz, Charity R; Onuk, Semra K
**Subject:** RE: H-1B EE RFE

If the EE relationship has not been established for the period requested, we issue an RFE to allow the petitioner to submit evidence to establish eligibility for the validity period being requested. Upon response should the period be less than one year established then we provide one year. Should the evidence show the more than one year but less than the entire period requested, we only provide through EE relationship. If the entire period is established then the full time will be accorded.

---

**From:** Steele, Jenny B
**Sent:** Wednesday, March 31, 2010 10:07 AM
**To:** Gooselaw, Kurt G
**Cc:** Wolcott, Rachel A; Torres, Lory C; Dyson, Howard E; Dela Cruz, Charity R; Onuk, Semra K
**Subject:** H-1B EE RFE

If the initial petition is filed with an end-client letter, contract, or SOW and the validity period listed on the evidence is less than what is requested on the petition, do you want officers sending an EE RFE?

Ex: Initial petition requests 3 years validity and the initial evidence includes a letter signed by the end-client with a validity period of two to three years. Do we just grant for two years or should we RFE and give them an opportunity to come up with the 3 years they are requesting?

Thanks.

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

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

(b)(6)

## Jowett, Haley L

**From:** Devera, Jennie F
**Sent:** Wednesday, November 03, 2010 5:11 PM
**To:** Helfer, Wayne D; Fierro, Joseph; Chong, Jenny; Elias, Erik Z; Harvey, Mark E; Avetyan, Kurt H; Wolfert, George S; Ecle, Lynette C
**Subject:** RE: H1B Limited Validity Date Memo
**Attachments:** 2008-12-16, Standardized Notation Abbreviations.dot; Limited Validity Dates Memo Amended - 11-25-09.dot

The attached documents are actually the same but in different formats.

Division 1 is the only one using the memo to the file. The idea came up when we were getting so many inquiries on cases with shortened validity dates; even on cases that had the standardized abbreviation. I think this memo helped reduce the amount of inquiries.

I just thought I'd share that....

Thanks

Jennie

---

**From:** Helfer, Wayne D
**Sent:** Wednesday, November 03, 2010 2:19 PM
**To:** Fierro, Joseph; Chong, Jenny; Devera, Jennie F; Elias, Erik Z; Harvey, Mark E; Avetyan, Kurt H; Wolfert, George S; Ecle, Lynette C
**Subject:** H1B Limited Validity Date Memo

All,

I just noticed that the location of the attached document was only accessible from the DIV 1 O common folder. When the O common renovation project was undertaken, we wanted to avoid storing any adjudicative related templates or documents within division specific folders. As result, the attached document is now saved directly to the H1B adjudications directory as a document template. The specific file path is as follows:

O:_Adjudications\I-129\H1B1\4-Memos - to file

Please inform your officers that they can access this document directly at the aforementioned location.

Thanks

---

**Wayne Helfer | Senior Adjudication Officer | DHS | USCIS | California Service Center**

Laguna Niguel, CA 92677 | Tel [redacted] Fax: 949-389-8677 | Cell: [redacted] wayne.helfer@dhs.gov (b)(6)

## STANDARDIZED NOTATION ABBREVIATIONS FOR LIMITED AUTHORIZED STAY AS AN H-1B NONIMMIGRANT

On H1B cases where an officer has determined that the authorized stay should be limited to less time than the requested stay it would assist all parties involved if the officer notated the petition as to the reason the stay is limited. *Note: For efficiency and legibility purposes, the codes have changed. Use only the new codes provided below.*

| NEW CODE | PREVIOUS CODE | DEFINITION |
|---|---|---|
| LTD-A | (no previous code) | Stay limited to dates on contract with end-user. |
| LTD-B | LTD-LCA | Beneficiary's stay limited to the validity period shown on the LCA. |
| LTD-C | LTD-LISC | Stay limited-Beneficiary does not have permanent license. |
| LTD-D | LTD-MIS CALC | Stay limited-Attorney/Petitioner miscalculated dates (including counting travel days). |
| LTD-E | LTD-RT NOT DOC | Stay limited-Some dates claimed on recaptured time-not documented. |
| LTD-F | LTD-RT EVID NOT LEG | Stay limited-Evidence supporting recaptured time-not legible. |
| LTD-G | LTD- RT BEYOND 7TH YR | Stay limited-Recaptured time limited to the 6 year Rule. |
| LTD-H | LTD- AC 21/106 NO 365 DYS | Stay limited-Not eligible for AC 21 Sec 106:<br><br>Labor Certificate/I-140/I-485/Immigrant Visa is or was not pending 365 days. |
| LTD-J | LTD-AC 21/104 FINAL | Stay limited-Not eligible for AC 21 Sec 104:<br><br>Final Decision to deny Labor Certificate/I-140 or final decision is made on I-485/Immigrant Visa Application. |

| | | |
|---|---|---|
| LTD-K | LTD-AC 21/104 NO I40 | No approved I-140. |
| LTD-L | LTD-AC 21/104 VISA # | Visa number now available. |

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

U.S. Citizenship and Immigration Services

# Memo to File

Date:

Re: Limited Validity Date
WAC__ ___ _____

The authorized stay was limited to less time than the requested stay for the following reason(s):

☐ The beneficiary's stay was limited to the validity period shown on the LCA.

☐ The beneficiary does not have a permanent license.

☐ The Attorney/Petitioner miscalculated dates (including counting travel days).

☐ The dates claimed on recaptured time were not documented.

☐ The evidence supporting recaptured time was not legible.

☐ Recaptured time is limited to the 6 year Rule.

☐ The beneficiary is not eligible for AC 21 under Section 106:

Labor Certificate/I-140/I-485/Immigrant Visa is or was not pending 365 days. Stay limited-Not eligible for AC 21 Sec 104:

☐ The beneficiary is not eligible for AC 21 under Section 104:

Final Decision to deny Labor Certificate/I-140 or final decision is made on I-485/Immigrant Visa Application.

☐ The beneficiary has no approved I-140.

☐ Visa number is now available for the beneficiary.

☐ The beneficiary's stay was limited to the validity period specified on the contract/end-user letter.

☐ The beneficiary's stay was limited to the duration of the temporary/restricted license (or one year, whichever is longer)

☐ Other:

**Jowett, Haley L**

**From:** Gooselaw, Kurt G
**Sent:** Thursday, May 28, 2009 12:36 PM
**To:** #CSC Division II
**Subject:** RE: H1B
**Attachments:** H-1B Consultants & Staffing Contracts D1.dot

Please see the attachment

---

**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.

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

*If the petitioner is requesting consulate/embassy notification, provide the following evidence in duplicate. Any document submitted to the Service containing a foreign language, must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English.*

Provide the following to establish that the present petition meets the criteria for H-1B petitions involving a specialty occupation:

- Consultants and Staffing Agencies: It appears that the petitioner is engaged in the business of consulting, employment staffing, or job placement that contracts short-term employment for workers who are traditionally self-employed. As such, submit evidence to establish that a specialty occupation exists for the beneficiary.

  Regardless of whether the beneficiary will be working within the employment contractor's operation on projects for the client or at the end-client's place of business - USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Please clarify the petitioner's employer-employee relationship with the beneficiary and, if not already provided, submit the following evidence:

  - copies of signed contracts between the petitioner and *INSERT BENEFICIARY NAME*;

  - 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; and

  - 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 that specifically lists *INSERT BENEFICIARY NAME* on the contract and provides 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.

NOTE: The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. Merely providing contracts between the petitioner and other consultants or employment agencies that provide consulting or staffing services to other companies may not be sufficient. There must be a clear contractual path shown from the petitioner, through any other consultants or staffing agencies, to an ultimate end-client.

**Jowett, Haley L**

**From:** Gooselaw, Kurt G
**Sent:** Friday, February 26, 2010 11:39 AM
**To:** Wolcott, Rachel A; Dela Cruz, Charity R; Dyson, Howard E; Onuk, Semra K; Steele, Jenny B; Torres, Lory C
**Subject:** RE: Memo questions

**Importance:** High

The one year minimum changed just the other day when SCOPS received these responses back from OCC. Apparently VSC was providing one year based on previous guidance. Since this issue has been brought up we were advised to follow the responses and RFE if the full validity period has not been established and provide up to one year if the employer/ee relationship is less than one year. All other aspects of the memo remain in force. Please ensure your officers are aware of this.

Thanks

---

**From:** Wolcott, Rachel A
**Sent:** Friday, February 26, 2010 9:26 AM
**To:** Gooselaw, Kurt G; Dela Cruz, Charity R; Dyson, Howard E; Onuk, Semra K; Steele, Jenny B; Torres, Lory C
**Subject:** RE: Memo questions

In reading the responses, we are on board with all except the date given. Based on your guidance per our meeting they are instructed to give only to the end date of the contract. Do you this changed?

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**From:** Gooselaw, Kurt G
**Sent:** Friday, February 26, 2010 9:03 AM
**To:** Dela Cruz, Charity R; Dyson, Howard E; Onuk, Semra K; Steele, Jenny B; Torres, Lory C; Wolcott, Rachel A
**Subject:** Memo questions

All,
See attached clarification on the H1B memo – the major change at this point is to provide 1 year if less than 1 year established on the relationship. It indicates to RFE if the relationship has not been established for the requested time and allow them to supplement the record. Please provide some feedback if we are already doing that as VSC just asked me.

Thanks

(b)(6)

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



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From: Perkins, Robert M
Sent: Wednesday, April 07, 2010 2:36 PM
To: VSC, Allied Group 3 Senior
Cc: Hall-Archambault, Melissa R; Bolog, Marguerite M; Bouchard, Armanda M; Chadwick, Donna; Howrigan, Tanya L; Janson, Nancy D; Lamothe, Judy L; Lockerby, Beth A; Montgomery, Laura; Perkins, Robert M; Rhodes-Gibney, Cathy S; Shuttle, Peter J; Sweeney, Mark M
Subject: Sorted Cap Cases

Melissa stopped by and indicated that there is a crate of Cognizant files set aside for review. Please review a random sampling and let me know what you find...

Thanks,

Rob

**Jowett, Haley L**

**From:** Nguyen, Carolyn Q
**Sent:** Friday, September 11, 2009 7:59 AM
**To:** Brokx, John B; Phan, Lethuy; Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Moran, Karla
**Subject:** RE: Validity Dates

**Follow Up Flag:** Follow up
**Flag Status:** Completed

Good morning,

I incorporated Erik and LeThuy's comments and added some of my own. Please review this draft instead of the one sent yesterday. Thanks.

| Scenarios | Validity Period | Comments/References |
|---|---|---|
| ***Health Care Workers***<br>o Unrestricted license<br>o Restricted license<br><br><br>o No license – lack of SS card or valid immigration document<br>o No license – physical presence | <br>Up to 3 years<br>One year or duration of restricted license, which ever is longer<br><br>1 year<br><br><br>1 year – if provided a letter from the State Licensing Agency indicating that the beneficiary is fully qualified to receive the required license upon admission | Velarde Memo dated 05/20/09<br><br>Cook Memo dated 11/20/01<br><br>Neufeld Memo dated 03/21/08<br><br>Notes –<br>o eligibility must be established at time of filing<br>o Letter of a scheduled exam is not sufficient |
| ***Teachers*** | Same guidance as Health Care Worker above | Cook Memo dated 11/20/01 |
| ***Off-site Employment***<br>o 10/25/10<br>o FID List (Active)<br>o H-1B Dependent<br>o Inordinate amount of filings compared to the number of employees | 1 year or duration of contract/letter, whichever is longer | Note – policy memo forthcoming |
| ***Professions that allows for one to work under the supervision of someone who possesses an unrestricted license*** | Up to 3 years | |
| ***Medical Resident***<br>o State does not require licensing<br>o State requires licensing | Up to 3 years<br><br>1 year or duration of the license, whichever is longer | |
| ***Unrestricted license but with*** | Up to 3 years | |

| | | |
|---|---|---|
| ***annual renewals*** | | |
| **AC21 - §106** | Remaining of the 6-yr period plus 1 year | A denied/revoked I-140 with a pending appeal is considered "pending" for the purpose of §106 extensions. See Aytes Memo dated 12/27/05. |
| **AC21 - §104** | Up to 3 years | |
| **O-1 and P-1 filed by a U.S. Agent** | Validity period should be given based on the validity of the contract between the petitioner and the beneficiary and the validity of the contract(s) between the actual employer(s) and the beneficiary | Notes –<br>o there may be a reasonable gap between each assignments or performance<br>o we may accept a letter from the actual employer indicating the intent to use the beneficiary's services in lieu of a contract |
| **Note** – if the H-1B extension request does not put the beneficiary over the 6-year limit, do NOT limit the validity date simply because there is a pending or approved I-140. | | |

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**From:** Nguyen, Carolyn Q
**Sent:** Thursday, September 10, 2009 3:38 PM
**To:** Brokx, John B; Phan, Lethuy; Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Moran, Karla
**Subject:** Validity Dates

Hi,

We have had an inordinate number of inquiries on the validity dates issue. Can you please review the below and let me know of any changes before I share with the officers? Feel free to add any other scenarios that we commonly encounter in our adjudication.

Thanks.

## Jowett, Haley L

**From:** Young, Claudia F
**Sent:** Friday, May 07, 2010 1:13 PM
**To:** Perkins, Robert M; Boudreau, Lynn A; Nguyen, Carolyn Q; Gooselaw, Kurt G
**Cc:** Gregg, Bret S; Hazuda, Mark J; Johnson, Bobbie L; Velarde, Barbara Q
**Subject:** Subpart H of restructured 214.2
**Attachments:** Subpart H masterclean.docx

**Importance:** High

VSC and CSC,

Happy Friday! We have been working with the Transformation team on a DHS initiative to restructure 8 CFR 214.2. The biggest chunk of that restructuring is the H classification. Attached is the most recent version of the restructured H section. We would like you to review the section and provide any edits and comments you may have.

Please don't hold back on this. We want your comments. We are looking to have this back by noon on Thursday, May 13th. This way we can consolidate everyone's comments and get this back to Transformation on Friday.

Please let me know if you have any questions. We appreciate your help with this.

Thanks,
Claudia

Claudia F Young
Branch Chief (Business Employment Services)
Service Center Operations
20 Massachusetts Ave., NW Suite 2000
Washington, DC 20529-2060
[redacted]

(b)(6)

**Subpart H: Temporary Employees.**

**§ 214.180 Applicability.**

The provisions of this subpart apply to nonimmigrants described in section 101(a)(15)(H) of the Act.

**§ 214.181 Requirements for admission; time limits.**

(a) Requirements for admission; time limits. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily in accordance with the terms of an approved petition filed by an employer. The limits on petition validity periods are prescribed in 8 CFR 214.186. There are several specific types of H visa classifications:

(1) H-1B specialty occupation worker, fashion model of distinguished merit and ability or cooperative research and development or co-production project worker. An alien who is coming to perform services in a specialty occupation, as a fashion model of distinguished merit and ability or to perform services of an exceptional nature requiring exceptional merit and ability relating to a cooperative research and development project or a co-production project provided for under a Government-to-Government agreement administered by the Secretary of Defense may be initially admitted or extended for the validity period of the approved petition plus a period of up to 10 days before the petition validity period begins and 10 days after the validity period ends. Petition requirements are described in 8 CFR 214.195 through 8 CFR 214.197;

(2) H-1B1 specialty occupation worker (admitted pursuant to an agreement listed in section 214(g)(8)(A) of the Act). A national of a country listed in section 214(g)(8)(A) of the Act coming to perform services in a specialty occupation may be initially admitted or extended for the validity period of the approved petition plus a period of up to 10 days before the petition validity period begins and 10 days after the validity period ends. H-1B1 petition requirements are described in 8 CFR 214.195;

(3) H-1C registered nurse. An alien coming temporarily to the United States to perform services as an H-1C registered nurse must have been initially admitted on or before December 20, 2009, for the validity period of the approved petition. The period of admission for an H-1C alien begins on the actual H-1C admission date and ends on the third anniversary of that date. Periods of time spent out of the United States for business or personal reasons during the validity period of the H-1C petition count towards the alien's maximum period of admission. An H-1C admitted initially for less than 3 years may be extended for the balance of the validity period of the approved petition in accordance with 8 CFR 214.187(f).

(4) H-2A temporary agricultural workers. An alien coming to perform agricultural labor of a temporary or seasonal nature may be initially admitted or extended for the validity period of the approved petition . Such alien may be admitted for an additional period of up to one week before the beginning of the approved period for the purpose of travel to the worksite and a 30-day period following the expiration of the H-2A petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. H-2A petition requirements are described in 8 CFR 214.199;

(5) H-2B temporary workers. An alien coming to perform other services of a temporary or seasonal nature may be initially admitted for the validity period of the approved petition. H-2B petition requirements are described in 8 CFR 214.200;

(6) H-3 trainees. An H-3 nonimmigrant may be admitted or extended for the validity of the petition approved on their behalf. H-3 petition requirements are described in 8 CFR 214.201; or

(7) H-4 spouse and dependents. The spouse and children of an H nonimmigrant, if they are accompanying or following-to-join the beneficiary in the United States, may, if otherwise

admissible, be admitted as H-4 nonimmigrants for the same period of admission or extension as the principal spouse or parent. Neither an H-4 spouse nor H-4 child may accept employment while in such status.

(b) Limitations on subsequent admission. Except as provided in paragraph (c) of this section, when an H nonimmigrant has spent the maximum allowable period of stay in the United States, a new petition or period of admission under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the following time periods:

(1) One year for H-1B specialty occupation worker or fashion model;

(2) One year for H-1B involved in a DOD research and development or coproduction project, except that such alien may not be readmitted to work on a DOD research and development or coproduction project;

(3) Six months for H-3 trainee or special education worker;

(4) Three months for H-2A temporary agricultural worker or H-2B temporary worker.

(c) Exceptions to limitations on admission. (1) H-1B, H-2B and H-3 aliens. There are several exceptions to the limitations on subsequent admission of H-1B, H-2B and H-3 aliens described in paragraph (b) of this section. To qualify for such an exception, the petitioner and the alien must provide clear and convincing evidence of eligibility for the exception. Evidence may consist of documentation such as arrival and departure records or entry and exit stamps, copies of tax returns, or records of employment abroad. The exceptions are:

(i) Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad specified in paragraph (b) of this section;

(ii) The limitations in paragraphs (b)(1) and (b)(3) of this section do not apply to H-1B, H-2B, and H-3 aliens who do not reside continually in the United States and whose employment in the United States is seasonal or intermittent or is for an aggregate of 6 months or less per year.

(iii) The limitations specified in paragraph (b) of this section do not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment.

(2) H-2A workers. Except as provided in 8 CFR 214.181(a)(4), an alien's stay as an H-2A nonimmigrant is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H-2A status for a total of 3 years may not again be granted H-2A status until such time as he or she remains outside the United States for an uninterrupted period of 3 months. An absence from the United States can interrupt the accrual of time spent as an H-2A nonimmigrant against the 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months. The determination regarding such interruption will be determined in admission, change of status or extension proceedings.

(3) H-2B workers. An absence from the United States can interrupt the accrual of time spent as an H-2B nonimmigrant against the 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months but less than three years, an absence is interruptive if it lasts for at least two months.

(d) Limitation on employment. An alien in H nonimmigrant status may engage solely in the employment specified in H petition filed in his or her behalf. Employment is not authorized

during any additional period of H admission authorized either before or after the actual petition validity.

(e) Effect of approval of permanent labor certification or filing of preference petition on H status. (1) H-1B or H-1C classification. The approval of a permanent labor certification or the filing of a preference petition for an alien is not a basis for denying an H-1B or H-1C petition or a request to extend such a petition, or the alien's admission, change of status, or extension of stay. The alien may come to the United States for a temporary period as an H-1B or H-1C nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States.

(2) H-2A, H-2B, and H-3 classification. The approval of a permanent labor certification or the filing of a preference petition for an alien currently employed by or in a training position with the same petitioner is a reason, by itself, to deny the alien's admission or extension of stay.

(f) Effect of strike or other labor dispute. The provisions of 8 CFR 214.9 are applicable to all H nonimmigrants if there is a strike or other labor dispute at their place of employment.

**§ 214.182 Temporary worker petitions: petitioner requirements.**

(a) Initial petition. A U.S. employer seeking to classify an alien as H temporary worker or trainee must file a petition on the form specified by USCIS with the fee prescribed in 8 CFR 103.7(b)(1) and in accordance with the form instructions. Except for an H-2B petition, the petitioner may not file, nor may USCIS approve, a petition earlier than 6 months before the date of actual need for the beneficiary's services or training. An H-2B petition may not be filed earlier than 120 days before the actual date of need identified on the temporary labor certification. The petitioner must establish at the time of filing that:

(1) The position offered meets the requirements of the classification sought; and

(2) The beneficiary is qualified for the position.

(b) Amended petition. Whenever there are any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition, the petitioner is required to file an amended petition with the fee specified in 8 CFR 103.7(b)(1) of this chapter and in accordance with the form instructions. An amended or new H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application. An exception to the labor certification requirement is provided for H-2A petitions in emergent circumstances in accordance with 8 CFR 214.199(i).

(c) Change of employer. If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition and, if needed, request an extension of the alien's stay. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition, within the limits specified in 8 CFR 214.181. Except as provided by section 214(n) of the Act for certain H-1B workers, the alien is not authorized to begin the employment with the new employer until the petition is approved.

(d) Service or training in more than one location. A petition which 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. For purposes of this paragraph, the petitioner's location is the address specified on the petition.

(e) Services or training for more than one employer. If the beneficiary will perform nonagricultural services for, or receive training from, more than one employer, each employer must file a separate petition unless an established agent files the petition.

(f) Agents as petitioners. (1) Function of an agent. A U.S. agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A U.S. agent may be:

(i) The actual employer of the beneficiary;

(ii) The representative of both the employer and the beneficiary; or

(iii) A person or entity authorized by the employer to act for, or in place of, the employer as its agent.

(2) Requirements for use of an agent. (i) Agent serving as employer. An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested;

(ii) Agent not serving as employer. A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries, if the supporting documentation includes a complete itinerary of services or engagements. The itinerary must specify 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. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation; and

(3) Use of agent by foreign employer. A foreign employer who, through a U.S. agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

(4) H-2A petition. An agent filing an H-2A petition must also comply 8 CFR 214.199(a)(6)(ii).

**§ 214.183 Temporary worker petitions: beneficiary requirements.**

(a) Multiple beneficiaries. More than one beneficiary may be included in an H-2A, H-2B, or H-3 petition if the beneficiaries will perform the same service or receive the same training, for the same period of time, and in the same location. H-2A and H-2B petitions for workers from countries not designated in accordance with 8 CFR 214.189 must be filed separately. Title 8 CFR 214.199(a)(2) prescribes special conditions for filing H-2A petitions with multiple beneficiaries.

(b) Unnamed beneficiaries. H-1B and H-3 petitions must include the name of each beneficiary. Unnamed baneficiaries for H-2A and H-2B petitions are permitted in accordance with 8 CFR 214.199 and 8 CFR 214.200, respectively.

(c) License requirements. (1) State or local requirement. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien seeking H classification in that occupation must have that license prior to approval of the petition.

(2) Temporary license. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, USCIS will consider the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the

alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

(3) Duties without license. In certain occupations which generally require a license, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, USCIS will consider the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

(4) Limitation on approval of petition. Where a license is required in an occupation, including registered nursing, the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. An alien who is accorded H classification in an occupation which requires a license may not be granted an extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

(d) Beneficiary previously admitted as H or L nonimmigrant. If an alien beneficiary has previously been admitted to the United States as an H or L nonimmigrant, the petitioner must provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to spend time abroad.

**§ 214.184 Numerical limitations.**

(a) Limits on affected categories. During each fiscal year, the total number of aliens who can be provided nonimmigrant classification is limited as follows:

(1) Aliens classified as H-1B nonimmigrants, excluding those involved in Department of Defense research and development projects or coproduction projects, may not exceed the limits prescribed in section 214(g)(1)(A) of the Act;

(2) Aliens classified as H-1B nonimmigrants to work for DOD research and development projects or coproduction projects may not exceed 100 at any time;

(3) Aliens classified as H-1B1 nonimmigrants may not exceed the limits prescribed in section 214(g)(8)(B) of the Act;

(4) Aliens classified as H-2B nonimmigrants may not exceed the limits prescribed in section 214(g)(1)(B) of the Act; and

(5) Aliens classified as H-3 nonimmigrant participants in a special education exchange visitor program may not exceed 50.

(b) Procedures. (1) Each alien issued a visa or otherwise provided nonimmigrant status is counted for purposes of any applicable numerical limit, unless otherwise exempt from such numerical limit. Requests for petition extension or extension of an alien's stay are not counted for the purpose of the numerical limit. The spouse and children of principal H aliens are classified as H-4 nonimmigrants and are not counted against numerical limits applicable to principals.

(2) Procedures for counting. When calculating the numerical limitations or the number of exemptions under section 214(g)(5)(C) of the Act for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals,

taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the "final receipt date"). The day the news is published will not control the final receipt date. When necessary to ensure the fair and orderly allocation of numbers in a particular classification subject to a numerical limitation or the exemption under section 214(g)(5)(C) of the Act, USCIS may randomly select from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection as validated by the Office of Immigration Statistics. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions filed on behalf of aliens otherwise eligible for the exemption under section 214(g)(5)(C) of the Act not randomly selected or that were received after the final receipt date will be rejected if the numerical limitation under 214(g)(1) of the Act has been reached for that fiscal year. Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded. If the final receipt date is any of the first five business days on which petitions subject to the applicable numerical limit may be received (i.e., if the numerical limit is reached on any one of the first five business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those five business days, conducting the random selection among the petitions subject to the exemption under section 214(g)(5)(C) of the Act first.

(3) Unused numbers. When an approved petition is not used because the beneficiary(ies) does not apply for admission to the United States, the petitioner must notify USCIS that the number(s) has not been used. The petition will be revoked and USCIS will take into account the unused number during the appropriate fiscal year.

(4) Rejection of petitions. If the total numbers available in a fiscal year are used, new petitions and the accompanying fee will be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year.

(5) Denial of petitions. Petitions received after the total numbers available in a fiscal year are used stating that the alien beneficiaries are exempt from the numerical limitation will be denied and filing fees will not be returned or refunded if USCIS later determines that such beneficiaries are subject to the numerical limitation.

**§ 214.185 Petitioner obligations.**

(a) Liability for transportation costs. (1) Applicability. Pursuant to section 214(c)(5) of the Act, the employer of an H-1B or H-2B nonimmigrant will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission. Within the context of this paragraph, the term "abroad" refers to the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H-1B or H-2B status.

(2) Voluntary resignation. Voluntarily resignation by the beneficiary during the validity period of the petition is not a dismissal and the employer is not liable for return transportation in such a case.

(3) Complaint procedure. If the beneficiary believes that the employer has not complied with this provision, the beneficiary may, in writing, advise USCIS. The complaint will be retained in the file relating to the petition.

(b) Reporting unused petition. When an approved petition is not used because one or more beneficiaries does not apply for admission to the United States, the petitioner must notify USCIS.

(c) Reporting change in employment. The petitioner must immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility. When the petitioner proposes to employ the beneficiary in a capacity which is significantly different than that stated on the petition, the petitioner is obligated to file an amended petition as described in 8 CFR 214.182(b).

(d) Special H-2A and H-2B obligations. Unique obligations applying to H-2A petitioners are described in 8 CFR 214.199(e). Unique obligations applying to H-2B petitions are described in 8 CFR 214.200(e).

**§ 214.186 Petition adjudication and validity.**

(a) Period of approval. USCIS will notify the petitioner whenever a visa petition, an extension of a visa petition, or an alien's extension of stay is approved under any H classification. Except as otherwise provided in this subpart H, petitions may not be approved beyond the validity period of any required labor certification, labor condition application, or labor attestation. The approval period for an initial petition or an extension is further limited as described in 8 CFR 214.182 and the special requirements prescribed elsewhere in this subpart H. Except as otherwise provided in this subpart H the approval period of an H petition will be as follows:

(1) H-1B petition in a specialty occupation. An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation will be valid for a period of up to 3 years and may be extended for a total of 6 years but may not exceed the validity period of the supporting labor condition application.

(2) H-1B petition involving a DOD research and development or coproduction project. An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien involved in a DOD research and development project or a coproduction project will be valid for a period of up to five years and may be extended for a total of 10 years.

(3) H-1B petition involving an alien of distinguished merit and ability in the field of fashion modeling. An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien of distinguished merit and ability in the field of fashion modeling may be valid for a period of up to three years and may be extended for a total of 6 years.

(4) H-2A petition. An H-2A petition will be approved through the expiration of the approved temporary agricultural labor certification.

(5) H-2B petition. The approval of the petition to accord an alien a classification under section 101(a)(15)(H)(ii)(b) of the Act may be valid for the period of the approved temporary labor certification.

(6) H-3 petition for alien trainee. An approved petition for an alien trainee classified under section 101(a)(15)(H)(iii) of the Act may be valid for a period of up to two years.

(7) H-3 petition for alien participant in a special education training program. An approved petition for an alien classified under section 101(a)(15)(H)(iii) of the Act as a participant in a special education exchange visitor program may be valid for a period of up to 18 months.

(b) Partial approval. A petition for more than one beneficiary or services at multiple locations may be approved in whole or in part. The approval notice will include only those beneficiaries approved for classification under section 101(a)(15)(H) of the Act.

(c) Special rules for determining petition validity. (1) Early approval. If a new H petition is approved before the date the petitioner indicates that the services or training will begin, the approved petition and approval notice will show the actual dates requested by the petitioner as the validity period, not to exceed the limits specified in paragraph (a) of this section or other USCIS policy.

(2) Late approval. If a new H petition is approved after the date the petitioner indicates that the services or training will begin, the approved petition and approval notice will show a validity period commencing with the date of approval and ending with the date requested by the petitioner, as long as that date does not exceed either the limits specified by paragraph (a) of this section or other USCIS policy.

(3) Licensed occupations. Limitations on H petitions for beneficiaries requiring licensure to engage in their occupation are subject to the limitations described in 8 CFR 214.183(c)(4).

(d) Approval period shorter than requested by petitioner. If the period of services or training requested by the petitioner exceeds the limit specified in paragraph (a) of this section or elsewhere in this subpart H, the petition will be approved only up to the limit specified in that paragraph.

(e) Use of approval notice. The beneficiary of an H petition who does not require a nonimmigrant visa, including an alien described in 8 CFR 212.1 or in 22 CFR 41.112(d), may present a copy of the approval notice at a port-of-entry to facilitate entry into the United States.

A beneficiary who is required to present a visa for admission and whose visa will have expired before the date of his or her intended return may use a copy the approval notice to apply for a new or revalidated visa during the validity period of the petition. The beneficiary may retain the copy and present it at the port-of-entry during the validity of the petition when reentering the United States to resume the same employment with the same petitioner.

(f) Denial. If USCIS proposes to deny an initial H petition, the petitioner will be notified of the reasons for the denial, and of his or her right to appeal the denial of the petition in accordance with the procedures described in 8 CFR 103.2(b) and 8 CFR 103.3. A petition for multiple beneficiaries may be denied in whole or in part.

**§ 214.187 Petition extension; extension of nonimmigrant stay.**

(a) Filing requirements. The petitioner may apply for both a petition extension and an extension of the alien's stay in the United States on the form designated by USCIS with the fee prescribed in 8 CFR 103.7(b)(1) and in accordance with the form instructions and 8 CFR 214.4. The dates of the requested petition extension and the extension of the beneficiary's authorized stay must be the same. The beneficiary must be physically present in the United States and the original petition must not have expired at the time of requesting an extension.

(b) Supporting documents. Supporting evidence required for the initial petition is not required for an extension unless requested by USCIS. However, any labor certification, labor condition application or attestation which was required for the initial petition must remain valid or be renewed for the period of the requested extension.

(c) Travel while extension request is pending. If the alien is required to leave the United States for business or personal reasons while an extension request is pending, the petitioner may request USCIS notify the Department of State of the petition extension.

(d) Exception for H-2A petition. A single H-2A petition may be extended without a labor certification as prescribed in 8 CFR 214.199(i).

(e) Decision. (1) Approval. Even though the requests to extend the petition and the alien's stay are combined, USCIS makes a separate determination on each. When the total period of stay described in 8 CFR 214.186 has been reached, no further extensions may be requested or approved. USCIS will notify the petitioner of the action taken on the petition extension and extension of stay.

(2) Petition denial. If USCIS proposes to deny a petition extension, the petitioner will be notified of the reasons for the denial, and of his or her right to appeal the denial of the petition in accordance with the procedures described in 8 CFR 103.2(b) and 8 CFR 103.3. A petition extension for multiple beneficiaries may be denied in whole or in part.

(3) Extension denial. The petitioner will be advised of the decision. There is no appeal from a decision to deny an extension of stay.

(f) Extension for H-1C nurses. An H-1C nurse who is otherwise eligible and maintaining H-1C status and who was granted admission or a change of status for less than the maximum period described in 8 CFR 214.181(a)(3) may apply for and receive an extension for the remainder of that period.

**§ 214.188 Revocation of petition.**

(a) Immediate and automatic revocation. The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or the Department of Labor revokes the labor certification upon which the petition is based.

(b) Grounds for revocation on notice. USCIS may send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

(i) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition;

(ii) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact;

(iii) The petitioner violated terms and conditions of the approved petition;

(iv) The petitioner violated requirements of section 101(a)(15)(H) of the Act or the requirements of this subpart H; or

(v) The approval of the petition violated the requirements of this subpart H or involved gross error.

(c) Procedure. The procedures for revocation are prescribed in 8 CFR 214.10.

**§ 214.189 H-2A and H-2B eligible countries.**

(a) Designation. Except as provided in paragraph (b) of this section, an H-2A or H-2B petition will only be approved for nationals of countries that the Secretary of Homeland Security has designated as participating countries, with the concurrence of the Secretary of State, in a notice published in the Federal Register, taking into account factors, including but not limited to:

(1) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal;

(2) The number of final and unexecuted orders of removal against citizens, subjects, nationals and residents of that country;

(3) The number of orders of removal executed against citizens, subjects, nationals and

residents of that country; and

(4) Such other factors as may serve the interests of the United States.

(b) Exception. A national from a country not on the list described in paragraph (a) of this section may be a beneficiary of an approved H-2A or H-2B petition upon the request of a petitioner or potential petitioner, if the DHS, it its sole and unreviewable discretion, determines that it is in the interest of the United States for that alien to be a beneficiary of such petition. Determination of such a U.S. interest will take into account factors, including but not limited to:

(1) Evidence from the petitioner demonstrating that a worker with the required skills is not available from among foreign workers (and, in the case of an H-2A beneficiary, from among U.S. workers) from a country currently on the list described in paragraph (a) of this section;

(2) Evidence that the beneficiary has been admitted to the United States previously in H-2A or H-2B status;

(3) The potential for abuse, fraud, or other harm to the integrity of the H-2A or H-2B visa program through the potential admission of a beneficiary from a country not currently on the list; and

(4) Such other factors as may serve the interests of the United States.

(c) Duration of certification. Once published, any designation of participating countries pursuant to paragraph (a)(1) of this section will be effective for one year after the date of publication in the Federal Register and will be without effect at the end of that one-year period.

**§ 214.190 Fees for certain nonimmigrant workers.**

Some H-1B and H-2B employers are required to pay additional fees prescribed in 8 CFR 103.7(b)(1). Petitioners must follow instructions for determining liability for these additional fees and for calculating the amount of such fees on the form and instructions provided by

USCIS.

The following definitions apply to H-1B petitioners who may seek exemption from the additional ACWIA fees:

Affiliated or related nonprofit entity means a nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary;

Applied research means research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met; investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services, and research and investigation in the sciences, social sciences, or humanities.

Basic research means research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities.

Governmental research organization means a U.S. Government entity whose primary mission is the performance or promotion of basic research and/or applied research.

Institution of higher education means one defined in section 101(a) of the Higher Education Act of 1965;

Nonprofit organization or entity means an organization that has been approved as a tax-

exempt organization for research or educational purposes by the Internal Revenue Service.

Nonprofit research organization or governmental research organization means a nonprofit research organization is an organization that is primarily engaged in basic research and/or applied research.

**§§ 214.191 – 214.194 [Reserved]**

**§ 214.195 Special requirements: H-1B and H-1B1 specialty occupation workers.**

(a) Petition requirements. A petitioner described in paragraph (d) must submit the following documentation with an H-1B or H-1B1 petition filed in accordance with 8 CFR 214.182 involving a specialty occupation defined in section 214(i)(1) of the Act:

(1) Labor condition application. A certification from the Secretary of Labor that the petitioner has filed a labor condition application as described in paragraph (e) of this section with the Secretary;

(2) Petitioner agreement. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay;

(3) Other evidence. (i) Form and substance. Evidence, as described in paragraphs (b) and (c) of this section, that the position offered to the alien is a specialty occupation and that the alien is qualified for such a position. Evidence must be in the form of certifications, affidavits, declarations, degrees, diplomas, writings, reviews, or other similar materials.

(ii) Education and training. School records, diplomas, degrees, affidavits, declarations, contracts, and similar documentation must reflect periods of attendance, courses of study, and similar pertinent data, and be executed by the person in charge of the records of the educational or other institution, firm, or establishment where education or training was acquired.

(iii) Affidavits. Affidavits or declarations, made under penalty of perjury and submitted by present or former employers or recognized authorities, must specifically describe the beneficiary's recognition and ability in factual terms and must set forth the expertise of the affiant and the manner in which the affiant acquired such information. Expert opinions must conform to the standards described in paragraph (g) of this section.

(iv) Contracts and agreements. Copies of any written contracts between the petitioner and beneficiary, or if there is no written contract, a summary of the terms of the oral agreement under which the beneficiary will be employed, may also be submitted as evidence.

(b) Evidence to establish a position qualifies as a specialty occupation position. To qualify as a specialty occupation, the petitioner must establish that the position meets 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;

(2) 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 it can be performed only by an individual with a degree;

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

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

(c) Beneficiary qualifications. To qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

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

(3) Hold an unrestricted state license, registration or certification 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, as prescribed in paragraph (f) of this section, to completion of a U.S. 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.

(d) Petitioner qualifications. An H-1B petitioner must be a U.S. employer. A U.S. employer includes 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.

(e) Labor condition application (LCA). (1) Requirement. An LCA is a certification from an H-1B petitioning employer which meets the requirements of section 212(n) of the Act and 20 CFR 655.700. When filing a petition for H-1B classification in a specialty occupation or as a fashion model of distinguished merit and ability, the petitioner is required to submit a notice

from the Department of Labor that it has filed such an LCA in the occupational specialty in which it will employ the alien(s).

(2) Effect of an LCA. Receipt by the Department of Labor of an LCA in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. USCIS determines if the application involves a specialty occupation. USCIS also determines whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation.

(3) Multiple petitions using a single LCA. If all of the beneficiaries covered by an H-1B LCA have not been identified at the time a petition is filed, petitions for newly identified beneficiaries may be filed at any time during the validity of the LCA using photocopies of the same application. Each petition must refer by file number to all previously approved petitions for that LCA.

(4) Restriction on substitution of beneficiaries. When petitions have been approved for the total number of workers specified in the LCA, substitution of aliens against previously approved openings cannot be made. A new LCA is required.

(5) Effect of violation of terms of an LCA. If the Secretary of Labor notifies USCIS that the petitioning employer has failed to meet a condition of section 212(n)(1)(B) of the Act, has substantially failed to meet a condition of section 212(n)(1)(C) or (D) of the Act, has willfully failed to meet a condition of section 212(n)(1)(A) of the Act, or has misrepresented any material fact in the application, USCIS will not approve petitions filed with respect to that employer under section 204 or 214(c) of the Act for a period of at least one year from the date of receipt of such notice.

(6) Effect of suspension on other approved petitions. If the employer's LCA is suspended or invalidated by the Department of Labor, USCIS will not suspend or revoke the employer's approved petitions for aliens already employed in specialty occupations if the employer has certified to the Department of Labor that it will comply with the terms of the LCA for the duration of the authorized stay of aliens it employs.

(f) Equivalence to a college degree. USCIS will review the education and experience claimed in the supporting documentation and determine whether an H-1B beneficicary has the equivalent of a U.S. baccalaureate degree or higher. In order to establish such equivalence, documentation must establish that the beneficiary possesses 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. One or more of the following determine equivalence:

(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 USCIS 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, 3 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 5 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 U.S. 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.

(g) Expert opinions submitted as supporting evidence. An expert opinion is a written opinion from a recognized authority. Such authority must be a person or an organization with expertise in a particular field, special skills or knowledge in that field and the ability to render an expert opinion concerning a particular subject. An expert opinion must include:

(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.

(h) Multiple H-1B petitions. (1) General prohibition. Except as provided in paragraph (h)(2) of this section, an employer may not file, in the same fiscal year, more than one H-1B petition on behalf of the same alien if the alien is subject to the numerical limitations of section 214(g)(1)(A) of the Act or is exempt from those limitations under section 214(g)(5)(C) of the Act.

(2) Exception. An employer may file a subsequent H-1B petition on behalf of the same alien in the same fiscal year, if the numerical limitation has not been reached or if the filing qualifies as exempt from the numerical limitation, if the original H-1B petition was denied for reasons other than fraud or misrepresentation. If USCIS believes that related entities (such as a parent company, subsidiary, or affiliate) may not have a legitimate business need to file more than one H-1B petition on behalf of the same alien subject to the numerical limitations of section

214(g)(1)(A) of the Act or otherwise eligible for an exemption under section 214(g)(5)(C) of the Act, USCIS may issue a request for additional evidence or notice of intent to deny, or notice of intent to revoke each petition. If any of the related entities fail to demonstrate a legitimate business need to file an H-1B petition on behalf of the same alien, all petitions filed on that alien's behalf by the related entities will be denied or revoked.

(3) Consequences of violation. Filing more than one H-1B petition by an employer on behalf of the same alien in the same fiscal year will result in the denial or revocation of all such petitions.

**§ 214.196 Special requirements: H-1B Department of Defense project workers.**

(a) Petition requirements. The petitioner must submit the following documentation with an H 1B petition filed in accordance with 8 CFR 214.182 involving services of an exceptional nature relating to DOD cooperative research and development projects or a co-production project:

(1) A verification letter from the DOD project manager for the particular project stating that the alien will be working on a cooperative research and development project or a co-production project under a reciprocal Government to Government agreement administered by DOD. Details about the specific project are not required;

(2) A general description of the alien's duties on the particular project, indicating the actual dates of the alien's employment on the project. For purposes of this classification, services of an exceptional nature include only those services which require a baccalaureate or higher degree, or its equivalent, to perform the duties;

(3) A statement indicating the names of aliens currently employed on the project in the United States and their dates of employment. The petitioner must also indicate the names of aliens whose employment on the project ended within the past year;

(4) Evidence, as described in paragraph (b) of this section, that the alien is qualified for such a position.

(b) Beneficiary qualifications. The beneficiary must hold a baccalaureate or higher degree or its equivalent in the occupational field in which he or she will be performing services.

(c) Non-exclusive use of special program. The existence of this special program does not preclude the DOD from utilizing the regular H 1B provisions provided the required guidelines are met.

**§ 214.197 Special requirements: H-1B fashion models.**

(a) Petitioner requirements. The petitioner must submit the following documentation with an H-1B petition filed in accordance with 8 CFR 214.182 involving prominent fashion models:

(1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary;

(2) Evidence the work which the alien is coming to perform in the United States requires the services of a prominent fashion model, such as involvement in events which have a distinguished reputation or with organizations with a record and reputation for production of such events.

(3) Evidence, as described in paragraph (b) of this section, that the alien is qualified for such a position.

(4) Copies of any written contracts between the petitioner and beneficiary, or a summary

of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

(b) Beneficiary qualifications. The beneficiary must be a fashion model of distinguished merit and ability, as described in paragraph (c) of this section. Documentation must include at least two of the following forms of documentation showing that the alien:

(1) Has achieved national or international recognition and acclaim for outstanding achievement in his or her field as evidenced by reviews in major newspapers, trade journals, magazines, or other published material;

(2) Has performed and will perform services as a fashion model for employers with a distinguished reputation;

(3) Has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies, or other recognized authorities in the field; or

(4) Commands a high salary or other substantial remuneration for services evidenced by contracts or other reliable evidence.

(c) Distinguished merit and ability. Distinguished merit and ability for an alien in the field of fashion modeling requires a determination by USCIS that the beneficiary is prominent in that field and that the services described in the petition require a model of prominence. USCIS will find a fashion model to be prominent if the documentation indicates the beneficiary has attained a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling.

**§ 214.198 Special requirements: H-1B physicians.**

(a) Petitioner requirements. In addition to the requirements specified in 8 CFR 214.195,

the petitioner must establish that the alien physician, other than a physician described in paragraph (c) of this section:

(1) Is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency, and that no patient care will be performed, except that which is incidental to the physician's teaching or research; or

(2) The physician has passed the Federation Licensing Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) or is a graduate of a U.S. medical school; and

(i) Has competency in oral and written English, demonstrated by the passage of the English language proficiency test given by the Educational Commission for Foreign Medical Graduates; or

(ii) Is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

(b) Beneficiary's qualifications. An H-1B petition for a physician must be accompanied by evidence that the physician:

(1) If he or she will perform direct patient care, holds a license or other authorization required by the state of intended employment to practice medicine, or is exempt by law from the license requirement, and

(2) Has a full and unrestricted license to practice medicine in a foreign state or has graduated from a medical school in the United States or in a foreign state.

(c) Exception for physicians of national or international renown. A physician who is a graduate of a medical school in a foreign state and who is of national or international renown in the field of medicine is exempt from the requirements of paragraph (a) of this section.

**§ 214.199 Special requirements: H-2A agricultural workers.**

(a) Petition requirements. (1) Eligible petitioners. The petition may be filed by either the employer listed on the temporary labor certification, the employer's agent, or the association of U.S. agricultural producers named as a joint employer on the temporary labor certification.

(2) Multiple beneficiaries. A single H-2A petition can include multiple beneficiaries if the total number does not exceed the number of positions on the relating temporary agricultural labor certification. The total number of beneficiaries on a petition or series of petitions based on a single temporary agricultural labor certification may not exceed the number of workers on the certification. If multiple petitions are filed using the same temporary agricultural labor certification, the petitioner must reference all prior petitions associated with that temporary agricultural labor certification. The nationalities of all beneficiaries on a petition must be provided. The names of all beneficiaries must be provided except for workers outside the United States who are nationals of eligible countries as described in 8 CFR 214.189.

(b) Initial supporting evidence. (1) Application. The petitioner must file an H-2A petition in accordance with 8 CFR 214.182 with a single valid temporary agricultural labor certification as described in paragraph (c) of this section.

(2) Temporary labor certification. An H-2A petitioner must establish that each beneficiary will be employed in accordance with the terms and conditions of the temporary labor certification including that the principal duties to be performed are those on the certification, with other duties minor and incidental. Representations required for the purpose of labor certification are initial evidence of this intent. However, the requisite intent cannot be established for two years after an employer or joint employer, or a parent, subsidiary or affiliate thereof, is found to have violated section 274(a) of the Act or to have employed an H-2A worker

in a position other than that described in the relating petition.

(3) Nature of employment. An H-2A petitioner must show that the proposed employment qualifies as a basis for H-2A status. The petitioner must establish that the employment proposed in the certification is of a temporary or seasonal nature.

(i) Seasonal. Seasonal employment is employment which is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations; or

(ii) Temporary. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.

(4) Beneficiary's qualifications. An H-2A petitioner must establish that any named beneficiary met the stated minimum requirements and was fully able to perform the stated duties when the application for certification was filed. The petitioner must establish at time of application for an H-2A visa, or at the time of application for admission if a visa is not required, that any unnamed beneficiary either met these requirements when the certification was applied for or passed any certified aptitude test at any time prior to visa issuance, or prior to admission if a visa is not required. These requirements include:

(i) Evidence of employment/job training. Evidence must be in the form of the past employer or employers' detailed statement(s) or actual employment documents, such as company payroll or tax records. Alternately, a petitioner must show that such evidence cannot be obtained, and submit affidavits from persons who worked with the beneficiary that demonstrate the claimed employment training.

(A) Named beneficiaries. For petitions with named beneficiaries, a petition must submit

evidence that the beneficiary met the certification's minimum employment and job training requirements, if any are prescribed, as of the date of the filing of the labor certification application.

(B) Unnamed beneficiaries. For petitions with unnamed beneficiaries, such evidence must be submitted at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States.

(ii) Evidence of education and other training. Evidence must be in the form of documents, issued by the relevant institution(s) or organization(s), that show periods of attendance, majors and degrees or certificates accorded.

(A) Named beneficiaries. For petitions with named beneficiaries, the petitioner must submit evidence that the beneficiary met all of the certification's post-secondary education and other formal training requirements, if any are prescribed in the labor certification application as of date of the filing of the labor certification application.

(B) Unnamed beneficiaries. For petitions with unnamed beneficiaries, the petitioner must submit such evidence at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States.

(iii) Eligible countries. The beneficiary must be a national of a country which meets the requirements of 8 CFR 214.203.

(c) Temporary agricultural labor certification. (1) Department of Labor considerations. In temporary agricultural labor certification proceedings the Secretary of Labor determines:

(i) Whether employment is as an agricultural worker;

(ii) Whether it is open to U.S. workers;

(iii) If qualified U.S. workers are available and if there would be any adverse impact caused by the employment of a qualified alien;

(iv) Whether employment conditions, including housing, meet applicable requirements; and

(v) Whether employment qualifies as temporary or seasonal.

(2) USCIS consideration of DOL findings. A DOL determination that employment qualifies is normally sufficient for the purpose of an H-2A petition. However, notwithstanding that determination, USCIS will not find that employment is temporary or seasonal where an application for permanent labor certification has been filed for the same alien, or for another alien to be employed in the same position, by the same employer or by its parent, subsidiary or affiliate. A petitioner can only overcome this finding by demonstrating that there will be at least a 6-month interruption of employment in the United States after H-2A status ends. Also, eligibility will not be found, notwithstanding the issuance of a temporary agricultural labor certification, where there is substantial evidence that the employment is not temporary or seasonal.

(d) Special filing situations. (1) Joint employer. Where a certification shows joint employers, a petition must be filed with an attachment showing that each employer has agreed to the conditions of H-2A eligibility.

(2) Agent. A petition filed by an agent must include an attachment in which the employer has authorized the agent to act on its behalf, has assumed full responsibility for all representations made by the agent on its behalf, and has agreed to the conditions of H-2A eligibility.

(e) Consent and notification requirements. (1) Consent. In filing an H-2A petition, a

petitioner and each employer consents to allow access to the site by DHS officers where the labor is being performed for determining compliance with H-2A requirements.

(2) Agreements. The petitioner agrees to the following requirements:

(i) To notify DHS, within 2 workdays, and beginning on a date and in a manner specified in a notice published in the Federal Register if:

(A) An H-2A worker fails to report to work within 5 workdays of the employment start date on the H-2A petition or within 5 workdays of the start date established by his or her employer, whichever is later;

(B) The agricultural labor or services for which H-2A workers were hired is completed more than 30 days earlier than the employment end date stated on the H-2A petition; or

(C) The H-2A worker absconds from the worksite or is terminated prior to the completion of agricultural labor or services for which he or she was hired.

(ii) To retain evidence of such notification and make it available for inspection by DHS officers for a 1-year period beginning on the date of the notification.

(iii) To retain evidence of a different employment start date if it is changed from that on the petition by the employer and make it available for inspection by DHS officers for the 1-year period beginning on the newly-established employment start date.

(iv) To pay $10 in liquidated damages for each instance where the employer cannot demonstrate that it has complied with the notification requirements, unless, in the case of an untimely notification, the employer demonstrates with such notification that good cause existed for the untimely notification, and DHS, in its discretion, waives the liquidated damages amount.

(3) Process. If DHS has determined that the petitioner has violated the notification requirements in paragraph (e)(2) of this section and has not received the required notification, the

petitioner will be given written notice and 30 days to reply before being given written notice of the assessment of liquidated damages.

(4) Failure to pay liquidated damages. If the petitioner fails to pay liquidated damages within 10 days of assessment, USCIS will not process an H-2A petition for that petitioner or any joint employer shown on the petition until such damages are paid.

(5) Abscondment. An H-2A worker has absconded if he or she has not reported for work for a period of 5 consecutive workdays without the consent of the employer.

(f) Effect of violations of status. An alien may not be accorded H-2A status who, at any time during the past 5 years, USCIS finds to have violated, other than through no fault of his or her own (e.g., due to an employer's illegal or inappropriate conduct), any of the terms or conditions of admission into the United States as an H-2A nonimmigrant, including remaining beyond the specific period of authorized stay or engaging in unauthorized employment.

(g) Limit on petition approval. If, due to the application of 8 CFR 181(c)(2), USCIS finds an alien eligible for a shorter H-2A admission period than that requested by the petition, the petition approval period will be adjusted accordingly.

(h) Substitution of beneficiaries after admission. An H-2A petition may be filed to replace H-2A workers whose employment was terminated earlier than the end date stated on the H-2A petition and before the completion of work; who fail to report to work within five days of the employment start date on the H-2A petition or within five days of the start date established by his or her employer, whichever is later; or who abscond from the worksite. The petition for the replacement worker(s) must be filed with a copy of the certification document, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (b) of this section. The petitioner must also submit a statement giving

each terminated or absconded worker's name, date and country of birth, termination date, and the reason for termination, and the date that USCIS was notified that the alien was terminated or absconded, if applicable. A petition for a replacement will not be approved where the requirements of paragraph (e) of this section have not been met. A petition for replacements does not constitute the notification required by paragraph (e) of this section.

(i) Extension in emergent circumstances. In emergent circumstances, as determined by USCIS, a single H-2A petition may be extended for a period not to exceed 2 weeks without an additional approved labor certification if filed on behalf of one or more beneficiaries who will continue to be employed by the same employer that previously obtained an approved petition on the beneficiary's behalf, so long as the employee continues to perform the same duties and will be employed for no longer than 2 weeks after the expiration of previously-approved H-2A petition. The previously approved H-2A petition must have been based on an approved temporary labor certification, which will be considered to be extended upon the approval of the extension of H-2A status.

(j) Consequences of a determination that fees were collected from alien beneficiaries.

(1) Denial or revocation of petition. As a condition of approval of an H-2A petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H-2A petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of H-2A employment (other than the lesser of the fair market value or actual costs of transportation and any government-mandated passport, visa, or inspection fees, to the extent that the payment of such costs and fees by the beneficiary is not prohibited by statute or Department of Labor regulations, unless the employer agent, facilitator, recruiter, or employment service has

agreed with the alien to pay such costs and fees).

(i) Fee collected by petitioner. If USCIS determines that the petitioner has collected, or entered into an agreement to collect, such prohibited fee or compensation, the H-2A petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, the petitioner has reimbursed the alien in full for such fees or compensation, or, where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated.

(ii) Fee collected by agent. If USCIS determines that the petitioner knew or should have known at the time of filing the petition that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service such fees or compensation as a condition of obtaining the H-2A employment, the H-2A petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, the petitioner or the facilitator, recruiter, or similar employment service has reimbursed the alien in full for such fees or compensation or, where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated.

(iii) Information disclosed after filing or approval of petition. If USCIS determines that the beneficiary paid the petitioner such fees or compensation as a condition of obtaining the H-2A employment after the filing of the H-2A petition, the petition will be denied or revoked on notice.

(iv) Reimbursement of fee, termination of collection agreement. If USCIS determines that the beneficiary paid or agreed to pay the agent, facilitator, recruiter, or similar employment service such fees or compensation as a condition of obtaining the H-2A employment after the filing of the H-2A petition and with the knowledge of the petitioner, the petition will be denied

or revoked unless the petitioner demonstrates that the petitioner or facilitator, recruiter, or similar employment service has reimbursed the beneficiary in full or where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated, or notifies DHS within 2 workdays of obtaining knowledge in a manner specified in a notice published in the Federal Register.

(2) Effect of petition revocation. Upon revocation of an employer's H-2A petition based upon paragraph (j)(1) of this section, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment.

(3) Reimbursement as condition to approval of future H-2A petitions. (i) Filing subsequent H-2A petitions within 1 year of denial or revocation of previous H-2A petition. A petitioner filing an H-2A petition within 1 year after the decision denying or revoking on notice an H-2A petition filed by the same petitioner on the basis of paragraph (j)(1) of this section must demonstrate to the satisfaction of USCIS, as a condition of approval of such petition, that the petitioner or agent, facilitator, recruiter, or similar employment service has reimbursed the beneficiary in full or that the petitioner has failed to locate the beneficiary. If the petitioner demonstrates to the satisfaction of USCIS that the beneficiary was reimbursed in full, such condition of approval will be satisfied with respect to any subsequently filed H-2A petitions, except as provided in paragraph (j)(3)(ii) of this section. If the petitioner demonstrates to the satisfaction of USCIS that it has made reasonable efforts to locate the beneficiary with respect to each H-2A petition filed within 1 year after the decision denying or revoking the previous H-2A petition on the basis of paragraph (j)(1) of this section but has failed to do so, such condition of

approval will be deemed satisfied with respect to any H-2A petition filed 1 year or more after the denial or revocation. Such reasonable efforts include contacting any of the beneficiary's known addresses.

(ii) Effect of subsequent denied or revoked petitions. An H-2A petition filed by the same petitioner subsequent to a denial under paragraph (j)(1) of this section will be subject to the condition of approval described in paragraph (j)(3)(i) of this section, regardless of prior satisfaction of such condition of approval with respect to a previously denied or revoked petition.

(4) Treatment of alien beneficiaries upon revocation of labor certification. The approval of an employer's H-2A petition is immediately and automatically revoked if the Department of Labor revokes the labor certification upon which the petition is based. Upon revocation of an H-2A petition based upon revocation of labor certification, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment.

**§ 214.200 Special requirements: H-2B temporary workers.**

(a) Petition requirements. (1) Eligible petitioners. An H-2B petition submitted in accordance with 8 CFR 214.182 may be filed by a U.S. employer, a U.S. agent, or a foreign employer filing through a U.S. agent. For purposes of this section, a foreign employer is any employer who is not amenable to service of process in the United States. A foreign employer may not directly petition for an H-2B nonimmigrant but must use the services of a U.S. agent to file a petition for an H-2B nonimmigrant. A U.S. agent petitioning on behalf of a foreign employer may file the petition and accept service of process in the United States in proceedings under section 274A of the Act, on behalf of the employer. The petitioning employer must

consider available U.S. workers for the temporary services or labor, and must offer terms and conditions of employment which are consistent with the nature of the occupation, activity, and industry in the United States.

(2) Multiple beneficiaries. A single H-2B petition can include multiple beneficiaries if the total number does not exceed the number of positions on the relating temporary labor certification. The total number of beneficiaries on a petition or series of petitions based on a single temporary labor certification may not exceed the number of workers on the certification. If multiple petitions are filed using the same temporary labor certification, the petitioner must reference all prior petitions associated with that temporary labor certification. The nationalities of all beneficiaries on a petition must be provided. The names of all beneficiaries must be provided except if the beneficiaries:

(i) Are outside the United States;

(ii) Are nationals of eligible countries as described in 8 CFR 214.189; and

(iii) The positions do not include education and experience requirements which must be documented for each beneficiary.

(b) Initial supporting evidence. (1) Application. The petitioner must file an H-2B petition in accordance with 8 CFR 214.182 with a single valid temporary labor certification as described in paragraph (c) of this section.

(2) Evidence of qualifications. In petitions where the temporary labor certification application requires certain education, training, experience, or special requirements of the beneficiary who is present in the United States, documentation that the alien qualifies for the job offer as specified in the application for such temporary labor certification.

(3) Statement of need. The employer must provide a statement describing in detail the

temporary situation or conditions which make it necessary to bring the alien to the United States and whether the need is a one-time occurrence, seasonal, peakload, or intermittent. If the need is seasonal, peakload, or intermittent, the statement must indicate whether the situation or conditions are expected to be recurrent. Generally, a temporary period will be limited to one year or less, but in the case of a one-time event it could last up to 3 years.

(i) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(ii) Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner must specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

(iii) Peakload need. The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

(iv) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

(c) Temporary labor certification. Prior to filing a petition to classify an alien as an H-2B worker, the petitioner must obtain a temporary labor certification issued by the appropriate certifying authority in accordance with the procedures described in this section and in 22 CFR 655, subpart A.

(1) Temporary labor certification (except Guam). (i) Secretary of Labor determination. An H-2B petition for temporary employment in the United States, except for temporary employment on Guam, must be accompanied by an approved temporary labor certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed U.S. workers.

(ii) Validity period. The Secretary of Labor may issue a temporary labor certification for a period of up to one year.

(iii) U.S. Virgin Islands. Temporary labor certifications for H-2B employment in the U.S. Virgin Islands may be approved only for entertainers and athletes and only for periods not to exceed 45 days.

(2) Temporary labor certification (Guam). (i) Scope of certification. An H-2B petition for temporary employment on Guam must include an approved temporary labor certification issued by the Governor of Guam in accordance with 8 CFR 214.203. The certification must state that qualified workers in the United States are not available to perform the required services and that the alien's employment will not adversely affect the wages and working conditions of U.S. resident workers who are similarly employed on Guam.

(ii) Validity period. The Governor of Guam may issue a temporary labor certification for a period up to one year. USCIS may invalidate a labor certification issued by the Governor of Guam in accordance with paragraph (j) of this section.

(d) Employment start date. Beginning with petitions filed for workers for fiscal year 2010, an H-2B petition must state an employment start date that is the same as the date of need stated on the approved temporary labor certification. A petitioner filing an amended H-2B petition due to the unavailability of originally requested workers may state an employment start date later than the date of need stated on the previously approved temporary labor certification accompanying the amended H-2B petition.

(e) Petitioner obligations. (1) Reporting violations. The petitioner agrees to notify DHS, within 2 work days, and beginning on a date and in a manner specified in a notice published in the Federal Register if:

(i) An H-2B worker fails to report for work within 5 work days after the employment start date stated on the petition;

(ii) The nonagricultural labor or services for which H-2B workers were hired were completed more than 30 days early; or

An H-2B worker absconds from the worksite or is terminated prior to the completion of the nonagricultural labor or services for which he or she was hired. An H-2B worker has absconded if he or she has not reported for work for a period of 5 consecutive work days without the consent of the employer.

(2) Maintaining records. The petitioner also agrees to retain evidence of such notification and make it available for inspection by DHS officers for a one-year period beginning on the date of the notification.

(f) Traded professional H-2B athletes. In the case of a professional H-2B athlete who is traded from one organization or another organization, employment authorization for the player will automatically continue for a period of 30 days after the player's acquisition by the new organization, within which time the new organization is expected to file a new H-2B petition. If a new petition is not filed within 30 days, employment authorization will be cease. If a new petition is filed within 30 days, the professional athlete will be considered to be in valid H-2B status and employment will continue to be authorized until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

(g) Substitution of beneficiaries after petition approval. Beneficiaries of H-2B petitions that are approved for named or unnamed beneficiaries who have not been admitted may be substituted only if the employer can demonstrate that the total number of beneficiaries will not exceed the number of beneficiaries certified in the original temporary labor certification. Beneficiaries who were admitted to the United States may not be substituted without a new petition accompanied by a newly approved temporary labor certification.

(1) Alien outside the U.S. To substitute beneficiaries who were previously approved for consular processing but have not been admitted with aliens who are outside of the United States, the petitioner must, by letter and a copy of the petition approval notice, notify the consular office at which the alien will apply for a visa or the port of entry where the alien will apply for admission. The petitioner must also submit evidence of the qualifications of beneficiaries to the consular office or port of entry prior to issuance of a visa or admission, if applicable.

(2) Alien in the U.S. To substitute beneficiaries who were previously approved for consular processing but have not been admitted with aliens who are currently in the United States, the petitioner must an amended petition, with the fee prescribed in 8 CFR 103.7(b)(1).

The amended petition must retain a period of employment within the same half of the same fiscal year as the original petition. Otherwise, a new temporary labor certification issued by DOL or the Governor of Guam and subsequent H-2B petition are required. The petitioner must also provide:

(i) A copy of the original petition approval notice;

(ii) A statement explaining why the substitution is necessary;

(iii) Evidence of the qualifications of beneficiaries, if applicable;

(iv) Evidence of the beneficiaries' current status in the United States, and

(v) Evidence that the number of beneficiaries will not exceed the number allocated on the approved temporary labor certification, such as employment records or other documentary evidence to establish that the number of visas sought in the amended petition were not already issued.

(h) Consequences of a determination that fees were collected from alien beneficiaries.

(1) Denial or revocation of petition. As a condition of approval of an H-2B petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H-2B petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of an offer or condition of H-2B employment (other than the lower of the actual cost or fair market value of transportation to such employment and any government-mandated passport, visa, or inspection fees, to the extent that the passing of such costs to the beneficiary is not prohibited by statute, unless the employer, agent, facilitator, recruiter, or similar employment service has agreed with the beneficiary that it will pay such costs and fees).

(i) Fee collected by petitioner. If USCIS determines that the petitioner has collected or entered into an agreement to collect such fee or compensation, the H-2B petition will be denied or revoked on notice, unless the petitioner demonstrates that, prior to the filing of the petition, either the petitioner reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary.

(ii) Fee collected by agent. If USCIS determines that the petitioner knew or should have known at the time of filing the petition that the beneficiary has paid or agreed to pay any agent, facilitator, recruiter, or similar employment service as a condition of an offer of the H-2B employment, the H-2B petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to filing the petition, either the petitioner or the agent, facilitator, recruiter, or similar employment service reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary.

(iii) Information disclosed after filing or approval of petition. If USCIS determines that the beneficiary paid the petitioner such fees or compensation as a condition of an offer of H-2B employment after the filing of the H-2B petition, the petition will be denied or revoked on notice.

(iv) Reimbursement of fee, termination of collection agreement. If USCIS determines that the beneficiary paid or agreed to pay the agent, facilitator, recruiter, or similar employment service such fees or compensation after the filing of the H-2B petition and that the petitioner knew or had reason to know of the payment or agreement to pay, the petition will be denied or revoked unless the petitioner demonstrates that the petitioner or agent, facilitator, recruiter, or similar employment service reimbursed the beneficiary in full, that the parties terminated any

agreement to pay before the beneficiary paid the fees or compensation, or that the petitioner has notified DHS within 2 work days of obtaining knowledge, in a manner specified in a notice published in the Federal Register.

(2) Effect of petition revocation. Upon revocation of an employer's H-2B petition based upon paragraph (h)(1) of this section, the alien beneficiary's stay will be authorized and the beneficiary will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment. The employer will be liable for the alien beneficiary's reasonable costs of return transportation to his or her last place of foreign residence abroad, unless such alien obtains an extension of stay based on an approved H-2B petition filed by a different employer.

(3) Reimbursement as condition to approval of future H-2B petitions. (i) Filing subsequent H-2B petitions within 1 year of denial or revocation of previous H-2B petition. A petitioner filing an H-2B petition within 1 year after a decision denying or revoking on notice an H-2B petition filed by the same petitioner on the basis of paragraph (h)(1) of this section must demonstrate to the satisfaction of USCIS, as a condition of the approval of the later petition, that the petitioner or agent, facilitator, recruiter, or similar employment service reimbursed in full each beneficiary of the denied or revoked petition from whom a prohibited fee was collected or that the petitioner has failed to locate each such beneficiary despite the petitioner's reasonable efforts to locate them. If the petitioner demonstrates to the satisfaction of USCIS that each such beneficiary was reimbursed in full, such condition of approval will be satisfied with respect to any subsequently filed H-2B petitions, except as provided in paragraph (h)(3)(ii) of this section. If the petitioner demonstrates to the satisfaction of USCIS that it has made reasonable efforts to

locate but has failed to locate each such beneficiary within 1 year after the decision denying or revoking the previous H-2B petition on the basis of paragraph (h)(1) of this section, such condition of approval will be deemed satisfied with respect to any H-2B petition filed 1 year or more after the denial or revocation. Such reasonable efforts include contacting all of each such beneficiary's known addresses.

(ii) Effect of subsequent denied or revoked petitions. An H-2B petition filed by the same petitioner subsequent to a denial under paragraph (h)(1) of this section is subject to the condition of approval described in paragraph (h)(3)(i) of this section, regardless of prior satisfaction of such condition of approval with respect to a previously denied or revoked petition.

(i) Enforcement. The Secretary of Labor may investigate employers to enforce compliance with the conditions of a petition and Department of Labor-approved temporary labor certification to admit or otherwise provide status to an H-2B worker.

(j) Invalidation of temporary labor certification issued by the Governor of Guam. (1) Basis for invalidation. A temporary labor certification issued by the Governor of Guam may be invalidated by USCIS if it is determined by USCIS or a court of law that the certification request involved fraud or willful misrepresentation. A temporary labor certification may also be invalidated if USCIS determines that the certification involved gross error.

(2) Notice of intent to invalidate. If USCIS intends to invalidate a temporary labor certification, a notice of intent will be served upon the employer, detailing the reasons for the intended invalidation. The employer will have 30 days in which to file a written response in rebuttal to the notice of intent. USCIS will consider all evidence submitted upon rebuttal in reaching a decision.

(3) Appeal of invalidation. An employer may appeal the invalidation of a temporary labor certification in accordance with 8 CFR 103.3.

**§ 214.201 Special requirements: H-3 trainees.**

(a) Alien trainee. The H-3 trainee is a nonimmigrant who seeks to enter the United States at the invitation of an organization or individual for the purpose of receiving training in any field of endeavor, such as agriculture, commerce, communications, finance, government, transportation, or the professions, as well as training in a purely industrial establishment. Physicians are statutorily ineligible to use H-3 classification in order to receive any type of graduate medical education or training.

(1) Externs. A hospital approved by the American Medical Association or the American Osteopathic Association for either an internship or residency program may petition to classify as an H-3 trainee a medical student attending a medical school abroad, if the alien will engage in employment as an extern during his/her medical school vacation.

(2) Nurses. A petitioner may seek H-3 classification for a nurse who is not H-1 if it can be established that there is a genuine need for the nurse to receive a brief period of training that is unavailable in the alien's native country and such training is designed to benefit the nurse and the overseas employer upon the nurse's return to the country of origin, if:

(i) The beneficiary has obtained a full and unrestricted license to practice professional nursing in the country where the beneficiary obtained a nursing education, or such education was obtained in the United States or Canada; and

(ii) The petitioner provides a statement certifying that the beneficiary is fully qualified under the laws governing the place where the training will be received to engage in such training, and that under those laws the petitioner is authorized to give the beneficiary the desired training.

(b) Supporting evidence. (1) Conditions of training. The petitioner is required to demonstrate that:

(i) The proposed training is not available in the alien's own country;

(ii) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;

(iii) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and

(iv) The training will benefit the beneficiary in pursuing a career outside the United States.

(2) Description of training program. Each petition for a trainee must include a statement which:

(i) Describes the type of training and supervision to be given, and the structure of the training program;

(ii) Sets forth the proportion of time that will be devoted to productive employment;

(iii) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;

(iv) Describes the career abroad for which the training will prepare the alien;

(v) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and

(vi) Indicates the source of any remuneration received by the trainee and any benefit which will accrue to the petitioner for providing the training.

(3) Restrictions on training program for alien trainee. A training program may not be approved which:

(i) Deals in generalities with no fixed schedule, objectives, or means of evaluation;

(ii) Is incompatible with the nature of the petitioner's business or enterprise;

(iii) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;

(iv) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;

(v) Will result in productive employment beyond that which is incidental and necessary to the training;

(vi) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;

(vii) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or

(viii) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

**§ 214.202 Special requirements: Participants in a special education exchange visitor program.**

(a) Petitioner requirements. (1) Program description. The H-3 participant in a special education training program must be coming to the United States to participate in a structured program which provides for practical training and experience in the education of children with physical, mental, or emotional disabilities.

(2) Petitioner facilities. The petition must be filed by a facility which has professionally trained staff and a structured program for providing education to children with disabilities, and

for providing training and hands-on experience to participants in the special education exchange visitor program.

(3) Restriction. The requirements in 8 CFR 214.201 for alien trainees do not apply to petitions for participants in a special education exchange visitor program.

(b) Supporting evidence. The petitioner for an H-3 petition for a participant in a special education exchange visitor program must submit:

(1) A description of the training program and the facility's professional staff and details of the alien's participation in the training program (any custodial care of children must be incidental to the training), and

(2) Evidence that the alien participant is nearing completion of a baccalaureate or higher degree in special education, or already holds such a degree, or has extensive prior training and experience in teaching children with physical, mental, or emotional disabilities.

**§ 214.203 Guam labor certification program.**

(a) Criteria for Guam labor certifications. The Governor of Guam will, in consultation with USCIS, establish systematic methods for determining the prevailing wage rates and working conditions for individual occupations on Guam and for making determinations as to availability of qualified U.S. residents.

(1) Prevailing wage and working conditions. The system to determine wages and working conditions must provide for consideration of wage rates and employment conditions for occupations in both the private and public sectors, in Guam and/or in the United States (as defined in section 101(a)(38) of the Act), and may not consider wages and working conditions outside of the United States. If the system includes utilization of advisory opinions and consultations, the opinions must be provided by officially sanctioned groups which reflect a

balance of the interests of the private and public sectors, government, unions and management.

(2) Availability of U.S. workers. The system for determining availability of qualified U.S. workers must require the prospective employer to:

(i) Advertise the availability of the position for a minimum of three consecutive days in the newspaper with the largest daily circulation on Guam;

(ii) Place a job offer with an appropriate agency of the Territorial Government which operates as a job referral service at least 30 days in advance of the need for the services to commence, except that for applications from the armed forces of the United States and those in the entertainment industry, the 30-day period may be reduced by the Governor to 10 days;

(iii) Conduct appropriate recruitment in other areas of the United States and of its territories if sufficient qualified U.S. construction workers are not available on Guam to fill a job. The Governor of Guam may require a job order to be placed more than 30 days in advance of need to accommodate such recruitment;

(iv) Report to the appropriate agency the names of all U.S. resident workers who applied for the position, indicating those hired and the job-related reasons for not hiring; (v) Offer all special considerations, such as housing and transportation expenses, to all U.S. resident workers who applied for the position, indicating those hired and the job-related reasons for not hiring;

(vi) Meet the prevailing wage rates and working conditions determined under the wages and working conditions system by the Governor; and

(vii) Agree to meet all Federal and Territorial requirements relating to employment, such as nondiscrimination, occupational safety, and minimum wage requirements.

(b) Approval and publication of employment systems on Guam. (1) Systems. USCIS must approve the system to determine prevailing wages and working conditions and the system

to determine availability of U.S. resident workers and any future modifications of the systems prior to implementation. If USCIS, in consultation with the Secretary of Labor, finds that the systems or modified systems meet the requirements of this section, it will publish them as a notice in the Federal Register and the Governor will publish them as a public record in Guam.

(2) Approval of construction wage rates. USCIS must approve specific wage data and rates used for construction occupations on Guam prior to implementation of new rates. The Governor must submit new wage survey data and proposed rates to USCIS for approval at least eight weeks before authority to use existing rates expires. Surveys must be conducted at least every two years, unless USCIS prescribes a lesser period.

(c) Reporting. The Governor must provide USCIS statistical data on temporary labor certification workload and determinations. This information must be submitted quarterly no later than 30 days after the quarter ends.

**§§ 214.204 - 214.205 [Reserved]**

## Jowett, Haley L

**From:** Nguyen, Carolyn Q
**Sent:** Tuesday, May 19, 2009 5:57 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
**Cc:** Gooselaw, Kurt G
**Subject:** validity period

Hi,

Please confirm that for cases where the work is performed for a third party, we are requesting contracts/SOWs/letters to ensure the proffered position is that of a specialty occupation. Further, we would limit the H-1B approval to the period specified in the contract.

Thanks.

## Jowett, Haley L

**From:** Johnson, Bobbie L
**Sent:** Wednesday, July 28, 2010 7:28 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)

Provide clarification on whether the officer should issue a split decision on an EOS case if there is a gap between the validity of the previous LCA and the current LCA, specifically an EOS by the same employer as stated in current SOP.

The regulation at 8 § CFR 214.2(h)(15)(ii)(B)(1) states that –

> An extension of stay may be authorized for a period of up to three years for a beneficiary of an H-1B petition in a specialty occupation or an alien of distinguished merit and ability. The alien's total period of stay may not exceed six years. The request for extension must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation.

Additionally, 8 CFR § 214.2(h)(9)(iii)(A)(1) states that:

> An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application.

Guidance in the H-1B National SOP (page 5-69 of 9/30/04 version; page 5-48 of 11/21/01 version) states that –

> ***Same Employer Exception (EOS petitions only):***
> If the beneficiary's status has expired prior to the date that you selected as the "from" date (according to the general rule listed above), 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. If the petition is filed by a ***different*** employer, DO NOT backdate the "from" validity date.

The H-1B National SOP goes on to state that–

> A gap between the expiration of the beneficiary's existing status and either the requested "from" date or the LCA "from" date does not automatically require that you deny the EOS request. Look at the evidence provided to determine if the reason for the gap is excusable.

While the National SOP permits us to close a gap by backdating an EOS with the same employer when there is a gap between the expiration of the beneficiary's existing status and the LCA "from" date, the Service Centers have pointed out that the SOP appears to be in conflict with the regulatory requirement at 8 CFR § 214.2(h)(9)(iii)(A)(i) that the H-1B approval period "may not exceed the validity period" of the LCA and regulation takes precedence over the SOP.

"The regulation at 8 CFR § 214.2(h)(9)(iii)(A)(i) is vague and ambiguous as to whether the word "exceed" applies to extension periods where the petitioner has an approved

petition but not an approved LCA. The regulation may be read to mean that the approved petition may not "go beyond" the ending validity period, rather than meaning that the approved petition may not "precede" the starting validity period of the LCA. The SOP confirms that our past practice in interpreting the regulation, in light of other regulatory provisions that allow for untimely extensions in certain circumstances, is to approve "closing the gap" by backdating the validity date . To depart from that past practice and interpretation may create a variety of operation, policy, and legal concerns.

Further, during the period from 11/5/09 to 3/9/10, when USCIS was temporarily accepting H-1B petitions filed without a certified LCA, one of the examples provided in the Questions and Answers document on USCIS's website at USCIS - Questions and Answers: Temporary Acceptance of H-1B Petition Filed without DOL's Certified Labor Condition Applications (LCAs) stated that:

> An H-1B petition requesting an extension of stay is filed with evidence of a pending LCA. The requested starting validity date listed on both the H-1B petition and pending LCA corresponds to the date the beneficiary's current H-1B status expires. However, because of the various delays in the ICERT system and the fact that the DOL cannot backdate the starting validity of an LCA, the LCA *originally filed with petition* is certified with a starting date that is subsequent to the date the beneficiary's current H-1B status has expired. Although the H-1B petition was timely filed with USCIS before the beneficiary's status expired, there is a gap between the starting date requested on the H-1B petition and the starting date authorized on the certified LCA *originally filed with the petition* (aka "LCA-gap").
>
> A: USCIS will not deny an H-1B petition filed during this temporary extension on the basis that the LCA originally filed with petition was certified after the petition was filed, as long as the case is found to be otherwise eligible. In the example above, USCIS will exercise discretion based on the totality of circumstances to determine whether to issue a Form I-94 showing continuous authorized stay and extension of stay.

8 CFR § 214.1(c)(4) allows us the discretion to excuse a late EOS filing. OCC interprets 214.1(c)(4) to grant USCIS the discretion to excuse a late filed petition despite the language of 214.2(h)(14) stating that a request for a petition extension may be filed only if the validity of the original petition has not expired. A strictly literal reading of the petition extension provision in (h)(14) would render the untimely extension provision in 214.1(c)(4) meaningless as nonimmigrant beneficiaries would, under this approach, not be able to obtain an approval of the underlying petition on which an untimely extension of stay request could be approved. These provisions have been, to date, read together and consistently and in a manner that benefits the petitioner and beneficiary if they are otherwise eligible under the criteria set forth in 214.2(h)(15) and 8 CFR § 214.1 (c)(4).

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~~This regulatory provision~~ 8 CFR § 214.1(c)(4) would be rendered meaningless if we did not interpret 8 CFR § 214.2(h)(9)(iii)(A)(1) to allow USCIS to accept a late-filed LCA as well. Example: USCIS decides, in its discretion, to accept a late-filed EOS where the lateness of filing was due to ineffective assistance of counsel. The attorney also late-filed the LCA. If we change our policy, and fail to close the gap, USCIS would be foreclosed from granting the late-filed EOS, despite our decision to accept the late EOS filing. A decision to change our policy and decide not to close the gap would moot the late-filed EOS regulatory provision.

Therefore, it would be appropriate to close the gap between LCA validity dates on an extension petition with the same employer, provided there are no other eligibility issues.

| Scenarios | Validity Period | Comments/References |
|---|---|---|
| ***Health Care Workers***<br>o Unrestricted license<br><br>o Restricted license<br><br>o No license – lack of SS card or valid immigration document<br><br>o No license – physical presence required | <br>Up to 3 years<br><br>1 year or duration of restricted license, which ever is longer<br>1 year<br><br>1 year – if the records include a letter from the State Licensing Agency indicating that the beneficiary is fully qualified to receive the required license upon admission | Velarde Memo dated 05/20/09<br><br>Cook Memo dated 11/20/01<br><br>Neufeld Memo dated 03/21/08<br><br>Notes –<br>o eligibility must be established at time of filing<br>o Letter of a scheduled exam is not sufficient |
| ***Teachers*** | Same guidance as Health Care Worker above | Cook Memo dated 11/20/01 |
| ***Off-site Employment***<br>o 10/25/10<br>o FID List (Active)<br>o H-1B Dependent<br>o Inordinate amount of filings compared to the number of employees | 1 year or duration of contract/letter, whichever is longer | Note – this instruction may change when we get the H-1B Policy Memo |
| ***Professions that allows for one to work under the supervision of someone who possesses an unrestricted license*** | Up to 3 years | |
| ***Medical Resident***<br>o State does not require licensing<br><br>o Temporary License<br><br>o Permanent License | <br>Validity period depends on the exemption stipulated (or not stipulated) by each State during the residency program. (See Examples)<br><br>1 year or duration of the license, whichever is longer<br>Up to 3 years | Examples – if no State license is required for:<br>▪ First year of residency – give 1 year<br>▪ The first 4 years of residency – give 3 years; or<br>▪ The duration of the residency program (or, conversely, if no time limitations are clearly stipulated) – give 3 years |
| ***Unrestricted license but with annual renewals*** | Up to 3 years | |
| **AC21 - §106** | Remaining of the 6-yr period plus 1 year | A denied/revoked I-140 with a pending appeal is |

| | | |
|---|---|---|
| | | considered "pending" for the purpose of §106 extensions. See Aytes Memo dated 12/27/05. |
| AC21 - §104 | Up to 3 years | Notes –<br>o Visa must be unavailable at time of filing not date of adjudication<br>o Visa number charged to Country of Birth |
| O-1 and P-1 filed by a U.S. Agent | Validity period should be given based on the validity of the contract between the petitioner and the beneficiary and the validity of the contract(s) between the actual employer(s) and the beneficiary | Notes –<br>o There may be a reasonable gap between each assignments or performances<br>o We may accept a letter from the actual employer(s) indicating the intent to use the beneficiary's services in lieu of a contract. These must be the same employers listed on the itinerary. |
| Note – if the H-1B extension request does not put the beneficiary over the 6-year limit, do NOT limit the validity date simply because there is a pending or approved I-140. | | |

Revised – 09/11/2009