H-1B Extension Beyond the Six-Year Limit
All Scenarios
(Rev. 07-10-09, D2)

DOL Final Rule and the Effect on AC21

The Department of Labor issued its Final Rule effective July 16, 2007. Part of that rule affects the adjudication of AC21 petitions. As of July 16, 2007, all approved labor certifications must be filed in support of an I-140 petition within 180 days of the approval date. If no I-140 is filed within 180 days of the labor certification approval date that labor certification becomes invalid.

H & L's Admitted As Parolees Applying for AC21 Exemption: see Federal Register, Vol 72, 61791 (11-01-2007)

All H or Ls that were admitted at the POE as parolees (DA or DT) can be re-admitted (read COS) by CSC officers in H or L status and extended pursuant to AC2 if they remain eligible for H or L status (I-797 validity period has not expired at the time of filing) and are eligible for AC21. If they do not meet the requirements above, the beneficiary will have to go to a consulate and apply for a visa. Do a split decision if the position qualifies as a specialty occupation.

H & L's working with an Employment Authorization Document (EAD) pursuant to 8 CFR 274a.12(c)(9) based on a pending I-485 applying for AC21 Exemption:

As long as the beneficiary remains eligible for H or L status (I-797 validity period has not expired at the time of filing) and is eligible for AC21, then the beneficiary can extend his or her stay beyond the six-year time limit.

AC21 Eligibility

Step	Action
1.1	**Section 104**: Only TWO Requirements – An approved I-140 and no visa is immediately available.

IF...	THEN...
At the time of filing, the I-140 has been approved and the visa **IS NOT** available [regardless of whether an I-485 is pending].	Grant up to 3 years of AC 21 if the petitioner requests it and the LCA covers the requested time.
At the time of filing, the I-140 has been approved and the visa **IS** available	They do not qualify for AC 21 under Section 104. Go to step 1.2 to determine eligibility under Section 106.

1.2 **Section 106:** Exemption of the 6-year limit due to lengthy adjudication.

IF...	THEN...

• The labor certification is unexpired* at the time of filing the Form I-129 H-1B extension; **and**
• The labor certification was filed with DOL or the I-140 was filed with USCIS at least 365 days:
  o prior to the six-year limit date, or
  o prior to the requested start date [if the 6-year limit has already been reached]; **and**
• No final decision (including pending appeals) is made to:
  o Deny the application for labor certification;
  o Revoke the approved labor certification;
  o Deny the I-140 petition**; or
  o Grant or deny the alien's application for immigrant visa or for adjustment of status [Form I-485].
	Grant up to one year of AC21 beyond any time remaining on the alien's 6-year maximum stay - including recaptured time – not to exceed a total of three (3) years.

The petitioner fails to comply with any one (1) of the above.	Deny AC21 benefits. Grant additional time for the balance of the 6-year limit if eligible, including recaptured time, or other exempt time – not to exceed a total of three (3) years.

***Unexpired Labor Certification Explained:** DOL Perm Fraud rule [see 20 CFR 656.30(b)]

On or after July 16, 2007: The petitioner has 180 calendar days after the permanent labor certification was approved by DOL in which to file the certification in support of a Form I-140 with USCIS - or the labor certification becomes invalid.

Prior to July 16, 2007: Certifications approved by DOL, must have been filed in support of an I-140 petition prior to January 13, 2008, in order to be valid (180 calendar days after the effective date of the DOL final rule).

Second or Subsequent I-140 Filed: If the first I-140 was denied, the filing of any subsequent I-140's using the same (original) labor certification that was submitted in support of the previously denied I-140 - keeps that labor certification valid for AC21 eligibility unless the labor certification is revoked by DOL.

****Approved I-140 & Visa Available:**

If the I-140 was recently approved, HQ stated that we need to give time to file an I-485. So officers can use discretion here and grant 1 year AC 21 on a recently approved I-140 (visa available) to allow time for the beneficiary to file an I-485, if either the I-140 or labor cert is more than 365 days old at the time of the six year anniversary date.

EOS – SAME EMPLOYER

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

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

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

EOS – DIFFERENT EMPLOYER

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

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

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

CHANGE OF STATUS

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

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

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

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

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

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

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

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

U.S. Citizenship and Immigration Services

CSC H-1B Matters

July 7, 2014 Issue 7

Reminders

- **Unscheduled VIBE Outages**

When VIBE is experiencing unscheduled outages or issues, officers should follow these procedures:

1. Report the unscheduled VIBE outage to the SISO and the CSC-VIBE e-mail box;

2. Continue adjudicating cases while the unscheduled VIBE outage is being resolved;

3. Do not hold cases while waiting for the unscheduled VIBE outage to be resolved; and

4. If officers still have unchecked cases when the unscheduled VIBE outage is resolved, officers should complete the VIBE checks at that time.

- **H-1B Adjudicative Priorities**

At the H-1B meeting on June 24, 2014, officers are reminded of the following adjudicative priorities:

- An appeal should have an adjudicative action (treating the appeal as a motion and granting motion and the Form I-129 or forwarding the appeal to the AAO) within 5 days of receipt into the officer's workstation;

- Finish any remaining untouched H-1B Cap cases; and

- H-1B Cap resubmits should be adjudicated within two weeks of the responses.

Procedural Guidance

- **AC21 benefits for derivatives**

An H-1B petition beneficiary does not qualify for AC21 benefits based on pending or approved permanent labor certification, Form I-140, or Form I-526 filed on behalf of the beneficiary's family members.

Whenever an officer adjudicates a request for AC21 benefit, the officer must first check whether the permanent labor certification, Form I-140, and/or Form I-526 was filed for the H-1B petition

beneficiary, not for his or her spouse or other family member. AC21 benefits cannot be granted to an H-1B petition beneficiary if the petition beneficiary does not have a pending or approved permanent labor certification, Form I-140 or Form I-526 filed on his or her own behalf.

CFDO Corner

There has been a change in the CFDO referral process for Form I-129 EOS where the beneficiary already changed status from F-1 through a prior petition. The reason for streamlining these SOFs is that the hit is on the suspect school and not the beneficiary.

Referral process for suspect schools where the hit relates to the school and not the beneficiary:

(b)(7)(c)

1. The ISO will send an e-mail to the Duty Officer (DO) at [redacted] with the following message in the subject line "Standard SOF Request for TECS hit on Suspect School_____" (fill in the suspect school's name). The body of the email should include the receipt number and beneficiary information;

2. The DO will input the receipt number, beneficiary information, and other pertinent information into DS;

3. The DO will pull the requested school's SOF and email it to the ISO;

4. The ISO will print out the SOF and place it on the non-record side of the file;

5. This process will take a maximum of five business days to complete, from when the ISO first emails the DO to when the DO sends the SOF; and

6. If there are requests exceeding this five business days timeframe, the ISO will ask the SISO to send an e-mail to SIO Debbie Lopez. CFDO will then follow up with the request.

For all other TECS hits (COS from F-1 to H-1B) where research on the beneficiary and the suspect school is needed, please continue to send those files to CFDO with a fraud referral sheet.

Questions and Answers

Question 1: For concurrent employment, must the validity end-date match the existing H-1B employment end-date?

Answer 1: No. USCIS may grant H-1B concurrent employment for end dates that do not match the existing H-1B employment end-date. Of course, all H-1B requirements must be met such as the three-year maximum, the six-year limit, AC21, LCA, or licensing. Concurrent employment start date is the date of adjudication or the requested start date, whichever is later.

Furthermore, maintenance of status should be verified for the existing H-1B employment. Maintenance of status is especially important when the existing H-1B employer was approved as a cap-exempt employer and the beneficiary is seeking concurrent employment at a cap-subject employer. A

2008 policy memorandum from Donald Neufeld states that when an H-1B worker who works for a cap-exempt employer seeks concurrent employment with a cap-subject employer, the officer should verify that the H-1B worker is still employed with the cap-exempt employer. If the H-1B worker "ceased" employment at the cap-exempt employer, the H-1B worker will become cap-subject and the worker may be ineligible for the requested benefit.

Question 2: For AC21 Section 104(c) purposes, do we use the H-1B worker's country of birth or country of citizenship to determine whether an immigrant visa is available?

Answer 2: INA 202(b) states that the foreign state to which an immigrant is chargeable is determined by birth within that foreign state. There are several exceptions to this country of birth chargeability. These exceptions are generally requested when an alien applies for an immigrant visa or adjustment of status. For AC21 104(c) purposes, use the H-1B worker's country of birth to determine immigrant visa availability. Please see your supervisor if the Form I-129 requests cross-chargeability.

H-1B in the News

Immigration reform is dead, so is raising the H-1B cap | June 27, 2014 | Computerworld

U.S. Citizenship and Immigration Services

CSC H-1B Matters

April 17, 2014 Issue 2

Reminders

• The contractors will not place ADIS printouts into FY2015 Cap cases from April 8, 2014 through April 19, 2014 (the first two weeks of FY2015 Cap data entry). This is for FY2015 Cap filings only. On April 22, 2014, the contractors will resume placing ADIS printouts into FY2015 Cap cases. If there are no ADIS printouts in the file, officers must place ADIS printouts into all H-1B cases seeking a change of status, extension of stay, or amendment of stay. The ADIS printouts must be within 15 days of the adjudication date. Follow these instructions to place date and FOUO marks into Internet Explorer 9 (Windows 7) printouts:

1. Open Internet Explorer, right click on the Tabs bar and select Menu bar. See picture.

2. Click File and then Page setup.

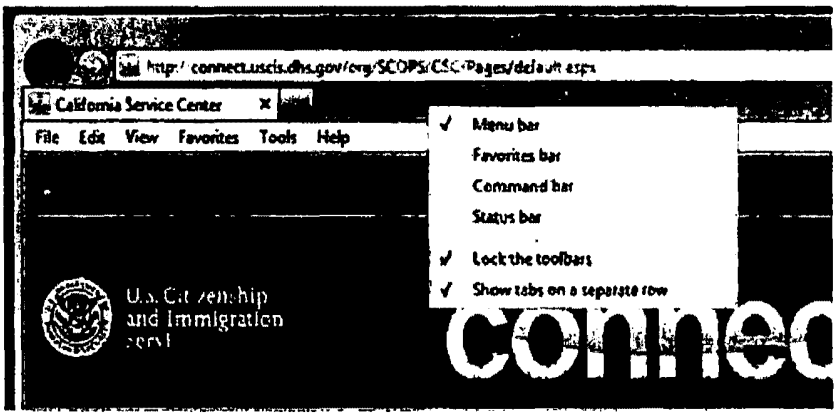
3. Select Custom in the first drop down menu under Footer.

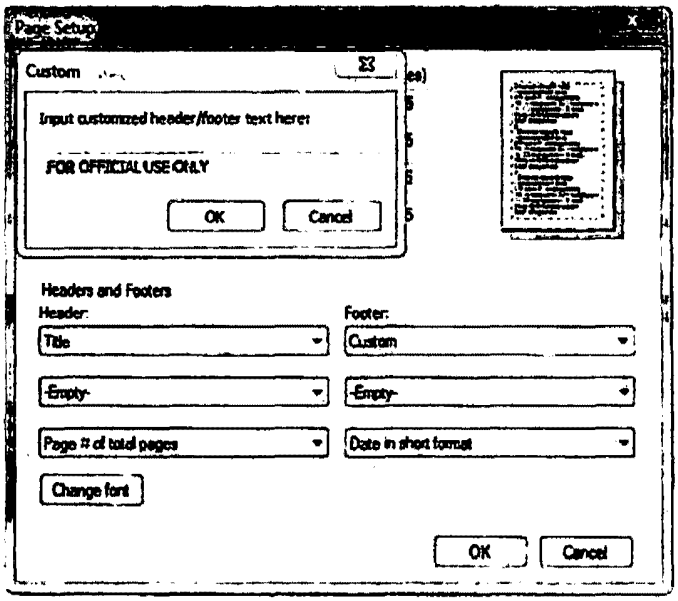
4. Replace the footer in the Custom dialog box with FOR OFFICIAL USE ONLY.

5. Click OK on the Custom dialog box.

6. Ensure that one of the next two drop down menus under Footer shows "Date in short format." If not, select that footer.

7. Click OK in the Page Setup dialog box to save settings.





• The EB-1 and EB-3 sections have dedicated fraud POCs for H-1B related cases. The POCs are currently working on cases in the lookout list and untouched cases from CFDO. If officers made referrals to CFDO, those referrals will be returned to the referring officers. If officers see fraud indicators or emerging trends in their cases, they can contact one of the following POCs for guidance.

- Wendy Clark (SISO)
- Ken Luu (SISO)
- Lorri Aguilar
- Christel Artuz
- Josef Avecilla
- Rachel Baca
- Keith Brandino
- Renato Crisostomo
- Yen Kim Dao
- Quan Diep
- Gwendolyn Itpick
- Beverly Lin
- Hui-Lan Lin
- John Mikalson
- Jason Nguyen
- Hernando Quandt
- Linda Rasson
- Rekha Rangaswamy

Procedural Guidance

- **New six years for a beneficiary previously in H-1B or L-1 status**

8 CFR 214.2(h)(13)(iii)(A) and 8 CFR 214.2(l)(12)(i) provide that a beneficiary who has spent a total of six years in the U.S. in H-1B status, five years in L-1B status, or seven years in L-1A status and combinations of all three may not be readmitted as an H-1B unless the alien has been outside the U.S. for the immediate prior year. Immediate prior year has been interpreted to mean that the alien was outside the U.S. for a total of one year prior to his or her last admission. Brief trips to the U.S. as a visitor for pleasure or business do not interrupt the one year requirement but those trips also do not count toward the one year requirement.

Numerous H-1B cases have been approved where the beneficiaries did not meet the one year requirement. Whenever a petitioner seeks a new H-1B stay for a beneficiary, officers must determine whether the beneficiary was previously in H-1B or L-1 status through checks of ADIS, TECS, CLAIMS National, and/or CCD. Do not rely on the petitioner to fully disclose all periods the beneficiary has spent in H-1B or L-1 status. The petitioner may not know or has not been told of all periods the beneficiary has spent in H-1B of L-1 status. These checks must be done even if the beneficiary is consular processing because the beneficiary may not have met the one year requirement. If there are unexplained gaps in the beneficiary's H-1B or L-1 stays, an RFE should be issued to address these gaps.

A common scenario is for an H-1B worker to change status to F-1 at the end of the H-1B worker's sixth year. The worker did not leave the U.S. after changing status. Several years later, the now F-1 student seeks another six years in H-1B. This student does not qualify for another six years in H-1B because the student did not spend at least one year outside the U.S. after the end of the student's prior H-1B stay. Please do not assume that just because this student is in F-1 status that the student has met the one year requirement. Officers must verify a beneficiary's prior H-1B or L-1 stays with system checks.

Numerous factors such as a beneficiary's prior H-1B or L-1 stays; when the beneficiary departed the U.S.; when the Form I-129 was filed; when the beneficiary returned to the U.S.; when the beneficiary will begin work; or the beneficiary's nonimmigrant status, will determine whether a Form I-129 for another six years in H-1B can be approved. Officers are encouraged to send detailed e-mails to the CSC H1B MATTERS mailbox for questions on this issue.

- **H-1B Cap VIBE Checks and Printouts**

Each H-1B case requires at least one VIBE score check prior to an adjudicative action (RFE, ITD, ITR, Approval, Denial, or Revocation). VIBE score can be checked in VIBE through the VIBE Status Reports ("VSRs") or the score can be found in CLAIMS GUI and/or Mainframe. VIBE printouts, either the VSRs or CLAIMS printouts, are not required to be placed into the file.

If an RFE/ITD was issued, the following If-Then table provides for follow-up VIBE checks for H-1B Cap cases only:

H-1B CAP VIBE CHECKS

If VIBE score in VSR or CLAIMS is	and VIBE score is	and an RFE/ITD addressing petitioner's issues was	Then

* All RFEs for VIBE related issues require supervisory concurrence (b)(7)(e)

- **RFE for H-1B fees**

The current practice is to include all other requests (if necessary) on an RFE for H-1B required fees. Please do not send an RFE for the H-1B required fees and then a subsequent RFE for other requests.

Questions and Answers

Question 1: What should an officer do if the beneficiary's passport has expired at the time the Form I-129 requesting extension of stay was filed?

Answer 1: USCIS has some discretion regarding passports on extensions of stay. 8 CFR 214.1(a)(3)(i) provides that a beneficiary seeking an extension of stay must present a passport only if requested to do so by DHS. The passport must be valid at the time the Form I-129 was filed. Also, a beneficiary who is required to present a passport to be admitted to the U.S. must keep his or her passport valid for the entire period of his or her stay in the U.S.

If the beneficiary's passport is expired at the time the Form I-129 extension of stay was filed, the current practice is to send an RFE for a valid passport. If evidence is presented that the beneficiary subsequently obtained a valid passport; made an effort to obtain a valid passport; or the beneficiary reasonably articulates why a valid passport cannot be obtained, the current practice is to grant the extension of stay. A denial of the extension of stay for not having a valid passport should be rare and such denial must be discussed with a supervisor.

If no passport copy is present in the file, system searches in ADIS, TECS, and/or CCD should be conducted to find a valid passport. Discretion can be applied whether a copy of a passport should be requested in an RFE.

Also, on extension of stay, please do not limit a beneficiary's stay to the validity of the passport because there are no regulatory provisions for such limits.

Question 2: When a issuing a split decision, should the officer change Part 2, Question 4 of the Form I-129 to "a. Notify the office in Part 4 so each beneficiary can obtain a visa or be admitted"? Should the officer update Part 2, Question 5 of CLAIMS GUI to "A: General Petition – no COS or EOS requested"?

Answer 2: No. Do not change Part 2, Question 4 of the Form I-129 to "a. Notify the office in Part 4 so each beneficiary can obtain a visa or be admitted". Instead, officers must write "Split Decision" in the Partial Approval box of the Form I-129 and attach a Form I-541 denial. Officers must also designate a consular post, PFI or POE on the Form I-129. Do not forget to annotate the duplicate Form I-129 (if any).

Also, do not update Part 2, Question 5 of CLAIMS GUI to "A: General Petition – no COS or EOS requested". When the clerk updates the split decision in CLAIMS GUI, the clerk will select the proper approval language and send the Form I-541 denial instead of a Form I-94.

CFDO Corner

(b)(7)(c) (b)(7)(e)

Exciting changes have been happening in the CFDO! Immigration Officers have been added to Team 2 – the CFDO team that is dedicated to H-1B fraud cases. The CFDO H-1B Fraud Team is:

PREMIUM PROCESSING ROUTING

If you have a Premium Processing case, please walk the case down to the CFDO so that the case can be processed in a timely manner. A PP Incoming Box (Goldenrod) has been set up outside of SIO Lopez workstation WS12014.

H-1B in the News

- Founder of bogus Pleasanton college is guilty in "visa mill" case | March 25, 2014 | Contra Costa Times

- Pr. George's schools' decision on visas leaves Filipino teachers uncertain about their futures | April 11, 2014 | The Washington Post

- Massachusetts' clever immigration reform workaround | April 14, 2014 | Fortune

Please send your suggestions, topics or questions to the CSC H1B Matters mailbox.

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Wednesday, March 24, 2010 11:48 AM
To: Wolcott, Rachel A; Dela Cruz, Charity R
Subject: FW: Limiting H-1B Validity Dates

Please advise on this. I believe we are issuing an RFE where the EE relationship has not been established for the period requested – whatever time is being requested whether less than or more than 1 year. Right?

From: Sweeney, Shelly A
Sent: Wednesday, March 24, 2010 9:37 AM
To: Nguyen, Carolyn Q; Gooselaw, Kurt G
Subject: FW: Limiting H-1B Validity Dates

Kurt and Carolyn,

Does the CSC handle these cases the same way that VSC outlines below, or do you handle them in a different manner?

Thanks!

Shelly

From: Perkins, Robert M
Sent: Wednesday, March 24, 2010 11:12 AM
To: Johnson, Bobbie L
Cc: Doherty, Shannon P; Sweeney, Shelly A; Bolog, Marguerite M; Bouchard, Armanda M; Howrigan, Tanya L; Parascando, Bridgette H; McCarthy, Thomas F; Burford, Mary H; Young, Claudia F
Subject: RE: Limiting H-1B Validity Dates

Bobbie,

The Q&A accompanying the employer-employee memo states:

"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)".

In order to minimize the number of RFEs issued, we intend to proceed as follows until further clarification is provided:

- If an employer-employee relationship has been established for a year or more and the petition is otherwise approvable, we will limit the petition's validity to the time period of qualifying employment established by the evidence. If we have to request evidence for some other reason, we will give the petitioner an opportunity to correct the deficiency in said RFE.

- If an employer-employee relationship has been established for less then a year, we will give the petitioner an opportunity to correct the deficiency in response to a request for evidence.

Thanks,

Rob

From: Perkins, Robert M
Sent: Friday, March 19, 2010 6:56 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

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

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: Friday, July 17, 2009 10:23 AM
To: Gregg, Bret S; Nguyen, Carolyn Q; Gooselaw, Kurt G; DeLosSantos, Marisol; Hazuda, Mark J; Perkins, Robert M; Lockerby, Beth A
Cc: Kruszka, Robert F; Cummings, Kevin J; Williams, Carol L
Subject: FW: USCIS Update Guidance to Employers
Attachments: USCISUpdate1(PT-OT)July172009.doc; USCISUpdate1(PT-OT)July172009.pdf

All,

The PT/OT press release was issued today.

Thanks!

Shelly

From: Clark, Matthew J
Sent: Friday, July 17, 2009 10:37 AM
To: Alfonso-Royals, Angelica M; Ash, Matthew L; Bacon, William H; Bentley, Christopher S; Blauvelt, Sally; Brown, Katherine HS; Brown, Meddie; Cabrera, Marilu; Carter, Constance L; Chandler, Matthew; Chang, Carrol; Clark, Matthew J; Ellis, Rachel; Frymyer, John M; Garcia-Upson, Maria; Garner, Angela L; Gradowski, Leonard S; Herrmann, Mary K; Jones, Rendell L; Key, Donnell E; Kielsmeier, Lauren; Kuban, Sara; Kudwa, Amy; Lacot, Rosalina; Mattingly, Kathryn A; McCament, James W; Mcgee, Ramona L; Melero, Mariela; Metellus, Harry SJ; Murnane, Kristin M; Murray, Jeff J; Nicholson, Claire K; Ostapowich, Stephanie A; Prince, Lillian L; Rhatigan, Chris; Rodriguez, Miguel E; Roles, Rebecca J; Rummery, Sharon; Santiago, Ana E; Santos, David M; Scarborough, Sarah Frances; Scheidhauer, Sharon E; Sebrechts, Marie T; Strong, Susan; Tintary, Ruth E; USCIS Web Publishing; Vick, Frank R; Wheeler, Shannon L; Wilcox, Julia D; Wright, William G
Cc: Sweeney, Shelly A; Cummings, Kevin J; Salem, Claudia S
Subject: USCIS Update Guidance to Employers

Hello All,

Summary:
U.S. Citizenship and Immigration Services (USCIS) today issued guidance to certain employers who received a denial of Form I-129, *Petition for Nonimmigrant Worker*, requesting H-1B classification for a beneficiary to practice in a health care specialty occupation prior to May 20, 2009.

Documents: USCIS Update (This time without Draft watermark, my apologies for the recall)

Date for Release: For Immediate Release Friday, July, 17, 2009

Guidance:
- Regional Media Managers- For your Information and your use as appropriate.
- Community Relations- For your information and distribution as appropriate (I have included the PDF for your use as appropriate).
- Congressional- For your information and distribution as appropriate.
- Internal- For your information and your use as appropriate.
- Customer Service – For your information.
- New Media- Please post on the home page and in the press room.

Best Regards,

Matt Clark

Matthew J. Clark
Communications Strategist
Office of Communications
U.S. Citizenship and Immigration Services
matthew.j.clark@dhs.gov
[redacted] office
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www.uscis.gov

(b)(6)

Office of Communications

U.S. Citizenship and Immigration Services

USCIS Update

July 17, 2009

USCIS Issues Additional Information to Employers Whose H-1B Petitions for Health Care Specialty Occupations Have Been Denied

WASHINGTON—U.S. Citizenship and Immigration Services (USCIS) today issued guidance to certain employers who received a denial of Form I-129, *Petition for Nonimmigrant Worker*, requesting H-1B classification for a beneficiary to practice in a health care specialty occupation prior to May 20, 2009.

If the Form I-129 was denied solely on the basis that the beneficiary did not possess a Master's or higher degree in the field, the petition may be reopened on service motion and will be adjudicated in accordance with the May 20, 2009 memorandum on "Requirements for H-1B Beneficiaries Seeking to Practice in a Health Care Occupation," which provides clarification on the standards for H-1B health care specialty occupations. USCIS will only review denials of petitions for which it has received a written request for review from the petitioning employer or its representative.

USCIS is requesting that employers whose petitions were denied on the above basis send an email to the Service Center that issued the denial of Form I-129 to request review of the denial. An affirmative request for review from the petitioner or its representative is required to expedite this process. In light of recently-issued guidance, USCIS is providing a special accommodation to the public by initiating Service Motions to Reopen (upon receiving an email request) in lieu of requiring petitioners to file an appeal. Therefore, USCIS is **not** requiring petitioners to submit an appeal fee or any other fee in this instance.

Requests should include "PT/OT Service Motion Request" in the subject line of the email, and will be accepted through August 14, 2009. Requests for review of H-1B health care specialty occupation petitions that were adjudicated at the California Service Center should be sent to: csc-ncsc-followup@dhs.gov.

Requests for review of H-1B health care specialty occupation petitions that were adjudicated at the Vermont Service Center should be sent to: vsc.ncscfollowup@dhs.gov.

Affected petitioners requesting USCIS review of their H-1B petition(s) are not required to submit a copy of the May 20, 2009 memorandum, but should explain how the beneficiary meets the standards set forth in that memorandum. Also, as with the reopening on a Service Motion, USCIS must be satisfied prior to approval that the beneficiary is currently eligible to practice in their respective health care occupation in the state of intended employment. Petitioners are advised to document this evidence. In any case where USCIS cannot make a final decision on the record before it, USCIS may request additional information. If the petition was denied upon additional grounds, or if the petitioner fails to submit requested evidence of the beneficiary's continuing eligibility, the original denial of the case will be affirmed.

For additional information, call the National Customer Service Center at (800) 375-5283.

– USCIS –

I-129 H-1B Requirements & Authority Adjudication Guide	
REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.

Filing Requirements		
Filing – when to		
...no more than six months prior to the start date or end of the current validity period.		8 CFR 103.2(a)(1). Instructions hold same weight as regulation. See I-129 Instructions. "Generally, a Form I-129 petition cannot be filed more than six months prior to the date employment is scheduled to begin."
Fees		
Base Fee	$ 325	8 CFR 103.7 & I-129 Instructions
Employer Fees – ACWIA		Omnibus Appropriations Act for FY 2005 (effective December 08, 2004) reinstituted the American Competitiveness in the Workforce Improvement Act (ACWIA). See 214(c)(9) of the Act. • Applies to initial & first extension filing only. • Does not apply to second or subsequent extension of stay filed by the employer regardless of when the first extension of stay was filed or whether the $1,500 or $750 filing fee was paid on the initial petition or the first extension of stay. • Does not apply to petitioners eligible for fee waivers – see below. NOTE: ACWIA fees cannot be paid by the beneficiary. See INA 212 (n)(2)(C)(vi)(II). Data entry rejects petitions if beneficiary pays ACWIA fees. USCIS should not deny or revoke the petition if it is discovered the beneficiary paid these fees. DOL can impose penalties and seek reimbursement to the alien for ALL fees, e.g., initial, first extension with same employer, change of employer, and ACWIA. (Rev. 01-27-2010)
26 or more employees	$1,500	
25 or less employees	$ 750	
Public Law 111-230	$2,000	Signed into law by President Obama on August 13, 2010. This fee is in addition to the base processing fee, the existing Fraud Prevention and Detection Fee, and any applicable American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) fee, needed to file a petition for a Nonimmigrant Worker (Form-129), as well as any premium processing fees for H-1B petitions postmarked on or after August 14, 2010, and will remain in effect through September 30, 2014. This additional fee applies to a petitioner who employs 50 or more employees in the U.S. with more than 50% of its employees in the U.S. in H-1B or L nonimmigrant status. Petitioners meeting these criteria must submit the applicable fee with an H-1B, L-1A, or L-1B petition filed to: • grant an alien nonimmigrant status described in subparagraph (H)(i)(b) or (L) of INA section 101(a)(15), this includes initial and new concurrent employment filings, or • obtain authorization for an alien having such status to change employers.
Premium Processing	$1,225	Premium Processing (PP) guarantees a decision (approval or denial) within 15 days of receipt. Issuance of Requests for Evidence and Intents to Deny (RFE's & ITD's) stop the PP clock.
Fee Waivers		
• Non-profit org, education, government research org		Must have proof: 501(c)(3), etc. See 8 C.F.R. 214 (h)(19)(iii)(B)
• Amended petitions		It is considered an extension if they ask for more time. Amended petitions

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
	are only for the same validity period.
• USCIS error	(i.e. USCIS data-entered the beneficiary's name incorrectly)
• 2nd or subsequent extension	With the same employer. If the petitioner is a "new employer" – Fees start all over again. Does not apply to second or subsequent extension of stay filed by the employer regardless of when the first extension of stay was filed or whether the $1,500 or $750 filing fee was paid on the initial petition or the first extension of stay.
Mandatory Fraud Fee $ 500	H-1B Visa Reform Act of 2004. Applies to initial approval of H-1B or L nonimmigrant status or seeking approval to employ an H-1B or L nonimmigrant currently working for another U.S. employer.
Cap Exemptions	Make sure the beneficiary was previously counted against the CAP. Check to see whether the previous employer was Cap exempt.
Section 214(g)(5) of the Act indicates that, "The numerical limitations [Cap] contained in paragraph (1)(A) shall not apply to any H-1B non-immigrant alien who:	(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (Pub. Law 89-329), or a related or affiliated nonprofit entity;
	(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization;....
Affiliations **ROUTE ALL AFFILIATIONS CASES TO: AD432*	For the purposes of determining affiliation USCIS uses 8 C.F.R. 214 (h)(19)(iii)(B) which states that an affiliated or related nonprofit entity is a non profit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education through one or more of the following:
	1. The petitioner is associated with an institution of higher education, through shared ownership or control by the same board or federation; 2. operated by an institution of higher education; or 3. attached to an institution of higher education as a member, branch, cooperative, or subsidiary. *See* Aytes Memo of 06/06/2006 for guidance for the exemptions of the H1B Cap (H-1B, Legal Reference, Cap Exemption folder).
Controlled Technology or Technical Data	Any Form I-129, Petition for a Nonimmigrant Worker filed on behalf of an H-1B, H-1B1, L-1, or O-1A beneficiary on or after February 20, 2011, **MUST INCLUDE A RESPONSE TO PART 6 OF THE PETITION,** "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States."
Troubled Asset Relief Program (TARP) Employ American Workers Act (EAWA), Pub. L. 111-5, Div. A, Title XVI, § 1611 sunset on February 16, 2011.	Officers should continue to follow previously issued EAWA guidance if the H-1B petition indicates that the beneficiary will begin employment before February 17, 2011. If the H-1B petition requests a start date of February 17, 2011 or later, officers should not deny an H-1B petition for lack of a valid LCA at the time of filing if the denial ground is solely based on the fact that the petitioner responded affirmatively to question 1d on Part A (page 17) of the

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
	H-1B Data Collection and Filing Fee Exemption Supplement but did not complete the H-1B dependent employer attestations on the LCA. This is regardless of the date the petition and/or LCA were filed. Additionally, petitioners requesting an employment start date of February 17, 2011 or later are not required to fill out question 1d on Part A (page 17) of the H-1B Data Collection and Filing Fee Exemption Supplement. Again, this is regardless of the date that the petition and/or LCA are filed. The officer should not issue an RFE requesting the petitioner to fill out this question if it is left blank. SCOPS will work to have this question removed in future versions of the form.
Signature	Petitioner must sign Part 6 of Form I-129. If prepared by someone other than petitioner, Part 7 must be signed by preparer.
G-28	Must be properly signed and appropriate category checked to be considered properly executed

Petitioner Requirements	
LCA - (DOL Form ETA-9035)	• Required with every petition. • Must be certified by DOL before filing the petition. • Must show all work locations. • Validity period for petition may not exceed the limits (dates) on the LCA. • The LCA is the governing document for purposes of approved validity periods. • Copies may be submitted for multiple beneficiaries but LCA must include a list of all previously approved petitions using the LCA.
	NOTE: Beware of LCA job descriptions for SOC (ONET/OES) occupation titles that are different than the job duties listed on the petition. RFE if there are clear differences. Example: The LCA shows a title with a job description as a Health Educator but the duties on the petition are those of a registered nurse and, coincidentally, the Beneficiary has a degree in nursing.
Employer	• Must have an Employer-employee relationship. • 8 CFR 214.2(h)(4)(ii) defines employer. • Evidence should establish employer's ability to hire, fire, supervise and control work of H-1B alien throughout the duration of the validity period requested. • right to control vs. actual control. *See* Memorandum from Donald Neufeld, Associate Director Service Center Operations, Citizenship and Immigration Services, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitioner, Including Third-Party Site Placements: Adjudicator's Field Manual Update AD10-24*, HQBCIS 70/6.2.8, AD 10-24 (January 08, 2010).
	From: Steele, Jenny B **Sent:** Wednesday, July 28, 2010 12:10 PM **To:** #CSC Division II;

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
Validity Periods for Employer-Employee Relationship	Cc: Gooselaw, Kurt G; Nguyen, Carolyn Q **Subject:** E-E Relationship and Validity Periods **Importance:** High This email supersedes any and all previous guidance on H-1B validity periods. As such the instruction below applies to all H-1B petitions including Cognizant. In general, the adjudicator does not need to issue an RFE if the petition initially contains evidence of an employer-employee relationship but the evidence does not cover the full period of time requested on the petition. The petition's validity should be limited to the time period of qualifying employment established by the evidence. Per previous instruction, if evidence is submitted for less than a year, the petition should be given a one-year validity period. However, there may still be instances in which the adjudicator determines that an RFE for evidence of the employer-employee relationship for the full validity period is necessary. In addition, SCOPS has provided the following instruction for the below situations: • the full validity period requested will be provided if the contract/end-client letter indicates that there is an automatic renewal clause (depending on the totality of the circumstances in the petition, an RFE may be issued if the contract/end-client letter is outdated); • an RFE should be issued if it is evident that the end/termination date was clearly redacted from the contract/end-client letter; and • an RFE may be issued if there is no end/termination date in the contract or end-client letter (this should be on a case-by-case basis if we can articulate a reason to believe that the beneficiary will be benched). Should you have any further questions or concerns regarding H-1B validity periods, please see your supervisor and/or ACD. Thanks.
Itinerary	8 CFR 214.(2)(h)(2)(i)(B) provides that an itinerary is required any time the petition requires services to be performed in more than one location. See Part D of the I-129, H-1B data collection supplement. If they claim offsite employment, they must have an itinerary.
Agents as petitioners	8 CFR 214.2(h)(2)(i)(F)
Itinerary	(1) Agent as employer – contract with beneficiary and itinerary required.
	(2) Agent filing for multiple employers - itinerary
Contracts	(3) cont'd. Contracts can be requested in questionable cases only. See employer-employee relationship memorandum listed in the "Employer" section above.
Fraud Prevention	Fraud is defined as a knowing and willful misrepresentation of a material fact.
Check all applicable databases	
Primary Fraud Identifiers from BFCA	Benefit Fraud & Compliance Analysis (BFCA) determined:

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
<$10 million gross annual income < 25 employees < 10 years since established	
Aberrant Filing Practices	...hundreds of H-1B filings in a short period of time – usually a ratio of 10 filings for every one employee (e.g., 10:1 ratio, 100 filings with only 10 employees). aka: Body Shops
Bona Fide Business	
Willful Violator	

Position Requirements	8 CFR 214.2(h)(4)(iii)(A)(1),(2),(3)&(4)
Degree – must be in a specific specialty	Check beneficiary's transcripts – there must be a nexus between the beneficiary's degree that qualifies him/her to perform the duties of the H-1B position.
Baccalaureate or higher:	
(1) Normally a minimum requirement	Authority: The DOL publication Occupational Outlook Handbook (OOH).
(2) Common to the industry or so complex	Copies of job announcements that show that the attainment of a baccalaureate or higher degree in a specific academic discipline is common place and is required as a minimum to enter into that specific occupational field by similar-sized companies.
(3) Employer normally requires the degree	The petitioner can show, through probative evidence, that in the past they have only hired individuals with a degree to perform the duties of the proffered position.
(4) Nature of the duties so specialized....	Petitioner must establish through probative evidence (trade journals, publications, recognized authorities, etc.) that the duties are so complex and specialized that only an individual with a degree in _____ would be able to perform the duties of the position.
Two positions, one petition	Normally, a petitioner files 1 petition for 1 position. However, it may be possible for a petitioner to file 1 petition for 2 positions. Example: A college professor will teach a chemistry course and a subsequent physics course within a particular validity period. If he has a degree in Chemical Physics, it may be okay to approve for both positions since he is qualified to teach both courses. However, clear it through your supervisor/ACD first.
Fraud Prevention	
No Bona Fide Job Offer	Accounting, Human Resources, Analysts, & Managers - business analysts, financial analysts, market research analysts, managers for advertising, marketing, promotions, public relations, and sales requested by marginal companies lacking the organizational complexity required to support such a position on a full-time basis for a three-year period may not qualify as bona fide job offers, (e.g., liquor stores, dry cleaners, gas stations, residential care facilities, convenience stores, donut shops, fast food restaurants, dental offices, 99 cent stores, parking lots, etc.). In such cases, if the petitioner is requesting an extension with the same employer – you may ask (with permission from your supervisor) for work product for the previous validity period to determine if it and the proffered position appear credible. Additionally you can "google" to see if the work product was plagiarized by the beneficiary.

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
	Market Research Analysts: Since approximately 2009 the OOH indicates that there is no minimum requirement in a specific field of study for entry into a Market Research Analyst position. However, a Market Research Analyst may still qualify as a specialty occupation if the position meets one of the three remaining criteria for a specialty occupation listed above.
Position title does not match description	See RFE. Must be a significant difference between the duties performed under the title shown on the LCA and the duties described by the petitioner, e.g., a teacher vs. a nurse.

Beneficiary Requirements	8 CFR 214.2(h)(4)(iii)(C)(1), (2),(3), (4), & (5)	
Must have one of the following:		
1. U.S. baccalaureate or higher degree	as required by the specialty from an accredited college or university in the United States	
2. Foreign degree determined to be equivalent to a US baccalaureate or higher	as required by the specialty occupation from an accredited college or university in the United States	
3. Unrestricted State license to fully practice and be immediately engaged in the specialty occupation in the state of intended employment.	School teachers, architects, healthcare workers, civil engineers or any other professions.	
	Temporary License –	give validity to the end of license or one year, whichever is longer.
	Permanent License –	give requested time up to three years.
4. Equivalency	8 CFR 214(h)(iii)((D) Combination of Education, Training, and Experience	
1. Evaluation from official who has authority to grant college credit for training or experience at an accredited college that has a program for granting such credit.	If the college official is writing the evaluation on behalf of a private educational evaluation firm the evaluation will not meet this requirement. However, it may, possibly, be used as recognition of expertise from one of the two recognized authorities in the specialty occupation for the determination of equivalency.	
2. CLEP or PONSI recognized college-level credit programs.	This evidence has never been seen. Keep in mind that to qualify under CLEP or PONSI the beneficiary would have had to successfully obtained CLEP/PONSI for each specific academic discipline. These certifications are not accumulative.	
3. Evaluation of foreign education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials.	Must have for all foreign degrees. They should have also submitted transcripts. The evaluation should not include experience or training for an equivalency. Foreign credentials evaluators evaluate foreign education – ONLY.	
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...who have achieved a certain level of competence in the specialty.	This evidence has never been seen except on First Preference, I-140 Immigrant Petitions for Aliens of Extraordinary Ability (E11). Examples include "The Royal Society"which is a fellowship of the most eminent scientists, engineers, and technologists from the UK and the commonwealth; and the IEEE (Institute of Electrical and Electronics Engineers) which have "Fellow" grade memberships which recognize unusual distinction in the profession and conferred only by invitation of the Board of Directors upon a person of outstanding and extraordinary qualifications and experience in IEEE-designated fields, and who has made important individual contributions to one or more of these fields.	

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
5. Determination by the Service.	
Baccalaureate: 3 years of specialized training or experience for every 1 year the alien lacks	It must be clearly demonstrated that the training and/or experience included the theoretical and practical application of specialized knowledge required by the specialty occupation that was gained while working with peers, supervisors, or subordinates who have a degree or equivalent in the specialty occupation.
Masters: baccalaureate with at least 5 years of experience in the specialty	And that the beneficiary has recognition of expertise from at least two recognized authorities in the specialty occupation.
Doctorate: No equivalency. Must have the doctorate degree or foreign degree equivalent if required	
Recognition of expertise by one of the following:	
1. Recognition of expertise from at least two recognized authorities in the specialty occupation.	8 CFR 214.2(h)(4)(c)(ii) defines *Recognized authority* as a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state: (1) The writer's qualifications as an expert; (2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) How the conclusions were reached; and (4) The basis for the conclusions supported by copies or citations of any research material used.
2. Membership in a recognized foreign or US association or society in the specialty occupation	• Example: Electronics Engineer who is a member of the IEEE (Institute of Electrical and Electronics Engineers). • Membership in the IEEE is open to individuals who by education or experience give evidence of competence in an IEEE designated field of interest. • The designated fields are, in broad terms: Engineering, Computer Science and Information Technology, Physical Sciences, Biological and Medical Sciences, Mathematics, Technical Communications, Education, Management, Law, and Policy.
3. Published material by or about the alien in professional publications trade journals, books, or major newspapers	
4. Licensure or registration to practice the specialty occupation in a foreign country, or	
5. Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.	

Beneficiary's Status	
Untimely Filing	Under 214.1(c)(4) a petition may be filed untimely if:

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
	i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances; (ii) The alien has not otherwise violated his or her nonimmigrant status; (iii) The alien remains a bona fide nonimmigrant; and (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act. Case-by-case basis. Contact a Div I supervisor for the RFE.
Passport Pages	Must be valid at time of filing
COS	• Must be maintaining status in U.S. at time of filing and while petition is pending. • If they depart the U.S. while the petition is pending they have abandoned their request for COS and their status must be denied (Form I-541). • See SQ94 in IBIS.
J-1 subject to 212(e)	Beneficiary is not even eligible to apply for an H or L nonimmigrant visa unless they have the waiver (I-612 Approval Notice) in hand. *See* 212(e) of the Act; 248 of the Act; and 8 CFR 214.2. However, we do not hold them to this requirement. They can submit an I-612 at the time of filing the I-129. If there is none with the file we must RFE to see if they have been granted an I-612 waiver.
Conrad 30 Waiver –	Foreign Medical Graduates (FMG) serving in underserved areas in compliance with an I-612 waiver of 212(e) 2-year residence requirement. NOTE: • A J-1 FMG cannot change to any other nonimmigrant classification (with the exception of H-1B for the sole purpose of fulfilling the terms/conditions of his or her Conrad 30 waiver) unless/until he or she fulfills all the terms/conditions of his or her Conrad 30 waiver. • Consequently, the J-2 spouse cannot change to any other nonimmigrant classification (with the exception of H-4 status in re: the J-1 FMG's H-1B limited status) unless/until the J-1 FMG fulfills all the terms/conditions of his or her Conrad 30 waiver. • Make sure that H-4s requesting a COS to H-1B are not dependents of FMG with a Conrad waiver.
EOS	Must be maintaining status in U.S. at time of filing. See SQ94 in IBIS.
Six-Year Limitation of Stay in H and/or L status	*See* 8 C.F.R. 214.2(h)(13)(iii)
AC21 - Exemptions of the 6-year limitation	Latest Guidance: Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, Bureau of Citizenship and Immigration Services, *Supplemental Guidance Relating to Processing Forms I-140*

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
	Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications "Affected by the American Competitiveness in the Twenty-First Century Act of 2000(AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277. (May30, 2008).
Section 104	Section 104(c) of AC21 - Exemption from the six-year maximum limitation of authorized stay in H and/or L nonimmigrant status when an H-1B nonimmigrant with approved I-140 petition is unable to adjust status (no I-485 or pending) due to limitation on visa availability by country. May be extended up to three (3) years
Section 106	The 21st Century DOJ Appropriations Act (November 02, 2002) amends § 106(a) of AC21 - Exemption from the six-year maximum limitation of authorized stay in H and/or L nonimmigrant status in cases of lengthy adjudication of the alien's lawful permanent resident status. May only be extended up to one year and/or in conjunction with an extension up to the six-year limit.
Recaptured time	...can be any time outside the U.S including seasonal or intermittent employment, etc. *See* Adopted Decision 06-0001 - H-1B Recapture of Time Spent Outside the United States
Outside U.S. for 1 year	Remainder Option: Where an alien has been absent from the United States for longer than a year but has time remaining on his or her initial maximum period of admission, USCIS will currently allow the alien to choose between being re-admitted for the remainder of the six-year period or admitted as a "new" H-1B alien subject to the H-1B fiscal year numerical limitation. See Michael Aytes Memorandum, dated 12-05-2006, *Guidance on...Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent From the united States for Over One Year.*
Commuters, Seasonal, or Intermittent Employment	If a beneficiary of an H or L classification is in the U.S. for six months or less each year, grant them an additional extension up to 3 years without regard to 6 year H classification limitation. Commuters from Mexico or Canada are exempt AC-21
IBIS	
SQ11	Good for 180 days.
SQ94	SQ94/NIIS check is required as follows, per the most current memos (2002 & 2005): • All EOS Denials within 15 days • All COS Approvals & Denials within 15 days

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
NSEERS	Effective Date: April 28, 2011 -- DHS Notice withdrawing NSEERS country designation Over the past six years, the Department of Homeland Security (DHS) has implemented several new automated systems that capture arrival and exit information on nonimmigrant travelers to the United States, and DHS has determined that recapturing this data manually when a nonimmigrant is seeking admission to the United States is redundant and no longer provides any increase in security. DHS, therefore, has determined that it is no longer necessary to subject nationals from these countries to special registration procedures, and this notice deletes all currently designated countries from NSEERS compliance. Afghanistan Eritrea Kuwait Oman Sudan Algeria Indonesia Lebanon Pakistan Syria Bahrain Iran Libya Qatar Tunisia Bangladesh Iraq Morocco Saudi Arabia UAE Egypt Jordan North Korea Somalia Yemen See Federal Register, Vol. 76, No. 82 / 23830 / Thursday, April 28, 2011 - found in the O common, I-129, NSEERS, Reference Material, HQ Policy Memoranda folder.

Beneficiary's Dependents Requirements	
Relationship	Review passports, marriage certificates, and/or birth certificates to establish relationship.
Status	
Passport Pages	Must be valid at time of filing.
COS	Must be maintaining status in U.S. at time of filing and while petition is pending. See SQ94 in IBIS.
EOS	Must be maintaining status in U.S. at time of filing. See SQ94 in IBIS.
IBIS	
SQ11	Good for 180 days.
SQ94	Must be checked within 15 days of decision. If applicant departed, approve to end of current validity. If departed after the end of the current authorized validity period, deny and give to the departure date.

Lookouts, etc.	
Petitioners:	

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
	See Policy Memorandum of April 28, 2011 on *Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation.*
Positions:	
Foreign Medical Graduates (FMG) who received waivers of 212(e) based on the Conrad Amendment to work as physicians in underserved areas	Route to: Michael Violett – Div I, AD432
Florida Hospital Nurses	Route to: Jenny Chong, SISO, Div I, AD503
Medical Residents in Maryland	The State doesn't issue a license. If you are going to limit the validity period to one year – get supervisory approval. Email Jenny Chong if you have any questions.

H-1B ADJUDICATION CHECK-LIST

(Rev. 03-28-13, D1)

Petitioner Requirements

- ❑ Check all applicable databases & systems (IBIS, ADIS, CLAIMS for prior filings, VIBE, SEVIS, Lookouts list).
- ❑ Same employer ❑ New employer ❑ New Filing
- ❑ Filing – Is it filed no more than six months prior to the start date or end of current validity period?
- ❑ Fees
  - ❑ Base Fee: $ 325
  - ❑ Employer Fees (ACWIA)
    - ❑ 26 or more employees $1,500
    - ❑ 25 or less employees $ 750
      - ❑ Fee Exempt
        - ❑ Higher Education, Non-profit research, government research, primary or secondary school
        - ❑ Amended petitions
        - ❑ USCIS error
        - ❑ 2nd or subsequent extension with same employer
  - ❑ Fraud Fee – mandatory for 1st filing with each employer $ 500
  - ❑ Public Law 111-230 Fee – mandatory for initial filing with each employer for employers with 50 or more employees of which 50% or more are in H or L nonimmigrant status $ 2000
- ❑ Cap Exempt? (Higher Education (or affiliated), Non Profit or Government Research, J-1 Conrad Physician with Conrad waiver)
- ❑ Signatures (Part 7 and both signatures on the H classification supplement)
- ❑ Release of controlled technology- Did they answer this question?
- ❑ G-28 – signed by petitioner and attorney. Beneficiary is not the affected party – cannot sign.
- ❑ LCA (DOL Form ETA-9035) – certified? Applies to the proffered position? Validity Period on LCA: From: _____ To: _____

Requested dates on Pet: From: _____ To: _____

- ❑ Employer or Agent ❑ Itinerary
- ❑ Employer-Employee Relationship (especially for third-party placement)
- ❑ Prior petition? Still valid? Previous Receipt Number: _____ Prior validity dates: _____

Position Requirements

- ❑ Degree - must be in the specific specialty required to perform the duties of the position
  - ❑ Baccalaureate or higher
    - ❑ Normally a minimum requirement..... Occupational Outlook Handbook
    - ❑ Common to the industry or so complex..... Job announcements
    - ❑ Employer normally requires the degree..... Employment History
    - ❑ Nature of the duties so specialized..... Complexity of duties
- ❑ License required?
- ❑ Physicians – Special Requirements (see RFE under Position Issues folder)

Beneficiary Requirements

- ❑ Must qualify
  - ❑ U.S. baccalaureate or higher degree in the specialty
  - ❑ Foreign degree determined to be equivalent to a U.S. baccalaureate or higher in the specialty
  - ❑ Unrestricted State License to fully practice and be immediately engaged in the specialty occupation in the State of intended employment ❑ temporary, ❑ permanent, ❑ working under licensed professional, e.g., architect or civil engineer
- ❑ Equivalency - Must have "recognition of expertise" in addition to one or more of the following:
  - ❑ Evaluation from an official who has authority to grant college level credit for training or experience – school has a program for such.
  - ❑ CLEP or PONSI recognized college-level programs.
  - ❑ Evaluation of foreign education by a reliable credentials evaluation service which specializes in such service.
  - ❑ Certification or Registration from a nationally-recognized professional association.
  - ❑ Determination by USCIS: ❑ Bachelor's: 3:1 ratio = yrs train/exp to 1 yr college. ❑ Master's: Bachelor's + 5 yrs train/exp.
  - ❑ Doctorate: Must have a doctorate degree or its foreign equivalent.
- ❑ EOS

  Beyond the "Six-Year Limit"
  - ❑ AC21
    - ❑ Section 104 - approved I-140 unable to adjust status due to unavailability of visa. Extended up to three (3) years
    - ❑ Section 106 – pending I-140 or Labor Cert for 365 days or more - extended up to one year
  - ❑ Recaptured Time

- ☐ Remained outside U.S. for one (1) year – cap available?
- ☐ Intermittent or Seasonal

☐ Status ☐ Current status: _____ Validity ends: _____ Date of 6-year limit: _____

- ☐ Timely filed petition?
- ☐ Passport Pages – must be valid at time of filing – continuing to maintain status
- ☐ Foreign Health Care Workers – Special Admissibility Requirements (see RFE currently under Position Issues folder)
- ☐ COS
  - ☐ J-1, subject to 212(e)? ☐ 212(e) waived - admissible? ☐ SEVIS

EOS – SAME EMPLOYER

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

Questions to ask:
- Is the beneficiary in status? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **recaptured time?** If so see *Note 3*
- Is the employment off-site? If so see *Note 4*
- Does the beneficiary possess a required license? *If so see Note 5*

Validity date will **begin** one day after the current H-1B status expires and will **end** for three years or until 1) the beneficiary has reached the six year limit, or 2) the petitioner requests less than a three year extension or 3) the LCA is valid less than a full three year extension or 4) one year or the end date of the contract/work order stated by third party employer(s) whichever is longer.

EOS – DIFFERENT EMPLOYER

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

Questions to ask:
- Is the beneficiary in status? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **recaptured time?** If so see *Note 3*
- Is the employment off-site? If so see *Note 4*
- Does the beneficiary possess a required license? *If so see Note 5*

Validity date will **begin** no earlier than the date of adjudication or will be valid at a date later than the date of adjudication if 1) the petitioner requests a later start date, or 2) the LCA is valid at a later start date, and will **end** for three years or until 1) the beneficiary has reached the six year limit or 2) the petitioner requests less than a three year extension or 3) the LCA is valid less than a full three year extension, or 4) the contract/work order is limited by third party employer(s).

CHANGE OF STATUS

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

Questions to ask:
- Is the beneficiary currently in valid status and/or will the beneficiary be in valid status when the COS is to begin? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **recaptured time?** If so see *Note 3*
- Is the employment off-site? If so see *Note 4*
- Does the beneficiary possess a required license? *If so see Note 5*

Validity dates will **begin** no earlier than the date of adjudication or will be valid at a date later than the date of adjudication if 1) the petitioner requests a later start date, or 2) the LCA is valid at a later start date, and will **end** for three years or until 1) the beneficiary has reached the six year limit or 2) the petitioner requests less than a three year extension or 3) the LCA is valid less than a full three year extension, or 4) the contract/work order is limited by third party employer(s).

Sustained Appeal Cases: the COS date of approval for appealed denial decisions sustained by the AAO is the date of adjudication. The date of adjudication has been determined to be the date the petition was denied. The date of denial is the effective date. – per Efren Hernandez, HQ.

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

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

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

AC-21 issues:
- *Is there evidence of an **unexpired** labor certification (LC) or employment-based immigrant petition that is or has been filed over 365 days?* If so, the adjudication can extend beyond the sixth year in **one** year increments. The LC has expired by virtue of not having been timely filed in support of an EB immigrant petition during its validity period, as specified by the DOL. Section 106 of AC21
- *Is there evidence of an approved I-140, but the visa is not available?* If so, the adjudicator can approve beyond the 6th year for up to **three** years. Section 104 of AC21

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

Note 4: The off-site employment:
Where the employment is at a third party work-site, and the provided contracts/work orders and/or itinerary

cover less time than requested or authorized by the LCA, only approve for the time period covered by these contracts/work orders and/or itinerary or one year whichever is longer.

Note 5: Required License:
If the temporary license is available and the beneficiary is allowed to perform the duties without a permanent license required by the occupation, then the petition may be approved for a period of 1 yr or for the period that the temporary license is valid, whichever is longer.

If the beneficiary is fully qualified but unable to obtain a full unrestricted license due to lack of SSN, valid immigrant document and/or physical presence in the US in the form of a letter from the State Board, then one year can be granted if otherwise approvable. The beneficiary must have the valid unrestricted license at the time the extension is filed.

U.S. Citizenship and Immigration Services

Form I-129

Petition for Non-Immigrant Worker

H-1B: Specialty Occupation Worker

Participant Guide

April 3, 2014

Creation Date: 04/01/2014

Notice to Students: The information below is provided to assist you with the processing of the Form I-129 Petition for Non-Immigrant Workers for an H-B Specialty Occupation Worker. If you have any questions or concerns regarding the content of this Participant Guide after you have attended the class, please speak to a supervisor or senior officer within your section for additional assistance.

Important Note: "This text has been compiled for TRAINING ONLY. It should NOT be used in place of official directives or publications. The text information is current according to the references listed. You should, however, remember that it is YOUR responsibility to keep up with the latest professional information available for your area of responsibility."

Overview

Objectives	Provide a basic overview of the H-1B nonimmigrant classification.
References	INA Sections 101, 212, 214 Title 8 CFR Parts 103, 214, 248, 274 HQ 70/6.2.8, AD 10-24: January 8, 2010 Memorandum Adjudicator's Field Manual (AFM) 11.1(c) Occupational Outlook Handbook – www.bls.gov/ooh
Agenda	Burden of Proof and Standard of Proof The Definition of an H-1B Nonimmigrant Worker Position and Beneficiary Requirements Petitioner Requirements Labor Condition Application Requirements (LCA)

Burden of Proof and Standard of Proof

What is the burden of proof?

The burden is on the petitioner to establish that he or she is eligible for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

What is the standard of proof?

The standard of proof applied is the "preponderance of the evidence" standard. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

Preponderance of the evidence seems that it is more likely than not that the beneficiary qualifies for the benefit sought. *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1999).

How do we apply the preponderance standard?

The petitioner has satisfied the standard of proof if the submitted evidence leads USCIS to believe that the claim is "probably true" or "more likely than not."

"More likely than not" is generally considered as greater than 50%.

What is an H-1B Nonimmigrant Worker?

An alien who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1) or as a fashion model, who meets the requirements for the occupation specified in section 214(i)(2) or, in the case of a fashion model, is of distinguished merit and ability...

Divisions of the H-1B Classification

- H-1B (1B1): Specialty occupation workers
- H-1B2 (1B2): Department of Defense (DOD) cooperative research and development project or co-production project workers
- H-1B3 (1B3): Fashion models of distinguished merit and ability

What is an H-1B Nonimmigrant Worker?

How many can apply?
The total number of H-1Bs in a fiscal year is 65,000, known as the cap.

When can they apply?
Petitioners can file cap petitions for the next fiscal year beginning on April 1 of the current fiscal year.

Are there any exemptions to the cap?

- Masters Cap – First 20,000 petitions filed on behalf of a beneficiary with a U.S. master's degree or higher
- Institutions of Higher Education
- Nonprofit entities that are related or affiliated with an institution of higher education
- Nonprofit research organizations or governmental research organizations

---

Position Requirements

What is a specialty occupation?
A specialty occupation is defined under INA section 214(i)(1) as:

1) Theoretical and practical application of a body of highly specialized knowledge; and
2) The attainment of a bachelor's degree or higher in a *specific specialty* (or its equivalent) as a minimum for entry into the occupation in the United States (emphasis added)

How do we determine if a position is a specialty occupation?
Does the position meet one of the following four criteria?

1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2) a) The degree requirement is common to the industry in parallel positions among similar organizations or,
   b) 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;

Position Requirements

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

Beneficiary Qualifications

How does a beneficiary qualify?

Does the beneficiary meet one of the following four criteria?

1) The beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2) The beneficiary holds a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3) The beneficiary holds 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) The beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Petitioner Requirements

Who can file a petition for a nonimmigrant worker?

A U.S. employer or an agent may file an H-1B petition for a nonimmigrant worker.

A U.S. employer is defined as a person, firm, corporation contractor or other association or organization who:

1) Engages a person to work within the U.S.
2) Has an employer-employee relationship with respect to employees under this part; and
3) Has an IRS tax identification number.

Petitioner Requirements

An agent may also file an H-1B petition if the beneficiary is traditionally self-employed or uses agents to arrange short term employment on their behalf with numerous employers. An agent may also file an H-1B petition for a foreign employer who authorizes the agent to act on its behalf.

In both cases, a U.S. employer and an agent must demonstrate that the employer has a valid employer-employee relationship with the beneficiary and that it will continue to exist through the duration of the H-1B validity period.

What is an employer-employee relationship?

The U.S. employer (petitioner) may hire, pay, fire, supervise, or otherwise control the work of the beneficiary.

Third Party Placement

Third party placement is the placement of a beneficiary that is not operated by the petitioner. However, an employer-employee relationship still needs to be established in these placements.

How do we determine if an employer-employee relationship exists in third party placement?

The petitioner has to establish that it has the right to control when, where, and how the beneficiary performs the job. Right to control is different from actual control. An employer may have the right to control the beneficiary's job-related duties but not exercise actual control over each function performed. To establish an employer-employee relationship, a petitioner has to establish the right to control.

Factors to consider in determining right to control

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

Petitioner Requirements

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

Labor Condition Application (LCA)

What is an LCA?

A LCA is a Department of Labor Form ETA 9035. The LCA must be submitted with every I-129 petition for H-1B classification (except for H-1B2), and must be certified by the DOL prior to the filing of the I-129.

USDOL regulations at Title 20, Code of Federal Regulations ("20 C.F.R.")655.700(b):

> Procedure for obtaining an H-1B visa classification. Before a nonimmigrant may be admitted to work in a "specialty occupation" or as a fashion model of distinguished merit and ability in the United States under the H-1B visa classification, there are certain steps which must be followed:
>
> 1) First, an employer shall submit to DOL, and obtain DOL certification of, a labor condition application (LCA)....
> 2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (INS Form I-129), together with the certified LCA, to INS, requesting H-1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, INS are set forth in INS regulations....

Labor Condition Application (LCA)

What information is on the LCA?

The LCA will provide information on the employer, rate of pay, period of employment, occupation information, work location(s), number of alien workers sought, employer labor condition statements, and employer declaration..

Standard Metropolitan Statistical Area (SMSA)

An LCA is required for each SMSA where the beneficiary will be working. Additional work locations may be listed on an LCA. A petitioner may file multiple LCAs as needed to cover additional work locations.

LCA Requirements

The LCA must be certified by the DOL prior to the filing of the I-129 petition. Employment may only be authorized for the validity period of the LCA. If the LCA lists multiple beneficiaries, the petitioner must submit a list of all prior petitions using the LCA each time a new petition is submitted. An LCA is required for each SMSA where the beneficiary will be working.

U.S. Department of Justice
Immigration and Naturalization Service

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

425 I Street NW
Washington, DC 20536

May 19, 1993

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

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

FROM: Office of Adjudications

SUBJECT: Determining Educational Equivalencies in Petitions Involving Specialty Occupations

Section 124(i) (1) (B) of the INA states, among other things, that a specialty occupation requires the attainment of a bachelor's degree or higher in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

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

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

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

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

R Michael Miller
Acting Assistant Commissioner

U.S. Department of Justice
Immigration and Naturalization Service

HQ 70/6.2.8

425 I Street NW
Washington, DC 20536

March 28, 1997

MEMORANDUM FOR All District Directors
All Officers-in-Charge
All Service Center Directors

FROM: Michael L. Aytes
Assistant Commissioner
Office of Benefits

SUBJECT: Criteria for H-1B Petitions Involving Specialty Occupations

The purpose of this memorandum is to remind officers involved in the adjudication of H-1B petitions for specialty occupations of the criteria described in 8 CFR 214.2(h)(4)(iii). The regulation describes the four criteria, which a petitioner can meet to establish that an occupation is a specialty occupation.

This office has been advised that some officers are requiring H-1B petitioners to meet all four of the criteria described in the regulation in order to establish eligibility for H-1B classification. Service officers are reminded that the regulation requires that the position meet only one of the four criteria listed in order to be considered to be a specialty occupation.

If you have any questions or require additional information, please contact Adjudications Officer John W. Brown at [redacted]

(b)(6)

Michael L. Aytes
Assistant Commissioner

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

U.S. Citizenship and Immigration Services

Memorandum

TO: Service Center Directors

FROM: Donald Neufeld
Associate Director
Service Center Operations Directorate

DATE: APR 2 3 2014

SUBJECT: Validity of Arrival/Departure Checks for Fiscal Year (FY) 2015 H-1B Cap Cases

These operating instructions supplement the guidance provided in the July 25, 2013, memorandum, "Operational Guidance to Document Arrival/Departure Information for Applicants/Beneficiaries of Nonimmigrant Petitions and Applications.

The July 25, 2013, memorandum states that USCIS shall review Arrival/Departure information for all applicants/beneficiaries in an appropriately designated DHS system, such as the Arrival Departure Information System (ADIS), no more than 15 days prior to rendering a final decision on an application or petition for a change of nonimmigrant status.

Effective immediately, ADIS checks completed in April 2014, for a FY2015 H-1B cap case, are valid until May 15, 2014. This extension will maximize efficiency and mitigate the impact of having to re-run ADIS checks on H-1B cap petitions.

This guidance applies to, and is binding on, all USCIS Service Center employees and contractors unless specifically exempt. Questions regarding this guidance should be directed to the Service Center Operations Directorate through appropriate channels.

Chong, Jenny

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

Sups,

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

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

Thanks,
Cristina

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

VSC and CSC:

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

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

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

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

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

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

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

Bobbie

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

(b)(6)

U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

U.S. Citizenship and Immigration Services

HQPRD70/23.12
AD06-24

Interoffice Memorandum

May 2, 2006

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
NATIONAL BENEFIT CENTER

FROM: Michael Aytes /s/
Acting Associate Director
Domestic Operations

SUBJECT: *AFM* Update: Chapter 31: H-1B Cap Exemption for Aliens Holding a Master's or Higher Degree from a U.S. Institution. (AD06-24).

This memorandum revises Chapter 31.3 of the *Adjudicator's Field Manual* (*AFM*). Chapter 31 pertains to the adjudication of H-1B petitions. This update will be included in the next INSERTS release. Accordingly, the *AFM* is revised as follows:

1. Section 31.3(g) in Chapter 31 of the *Adjudicator's Field Manual* is amended to include the following new paragraph at AFM 31.3(g)(9) to read as follows:

31.3 H-1B Classification and Documentary Requirements

* * * * *

(g) Adjudicative Issues.

* * *

(10) H-1B Cap Exemption for Aliens Holding A U.S. Master's or Higher Degree.

On December 8, 2004, the President signed the Omnibus Appropriations Act (OAA) for Fiscal Year 2005, Public Law 108-447, 118 Stat. 2809. Among the provisions of OAA is the H-1B Visa Reform Act of 2004. The H-1B Visa Reform Act of 2004 amends section 214(g)(5) of the INA by adding an additional exemption to the H-1B cap. New section 214(g)(5)(C) provides that aliens who have earned a masters' or higher degree from a

United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)) are exempt from the H-1B visa cap (up to a maximum of 20,000 per year). Once the 20,000 cap is reached, any employer seeking an alien who possesses a masters' or higher degree will be subject to the 65,000 annual limit for H-1B nonimmigrants unless the alien is eligible for another statutory or regulatory exemption..

When reviewing a petition involving a potential 20,000 cap case, adjudicators should first determine if there is another basis to exempt the alien beneficiary from the 65,000 H-1B cap. For example, if the alien is being petitioned for by an entity described in section 214(g)(5)(A) or (B) of the INA, he or she may be exempt from the annual 65,000 cap, as these provisions do not contain a numerical limit. Similarly, if the employer is simply amending the H-1B petition, seeking an alien for concurrent employment, or is changing employment for an alien who is already in H-1B status, the petition may be approved as a cap-exempt case. Adjudicators should always apply all exemptions that do not contain numerical limitations first before applying the "masters or higher" 20,000 exemption.

(1) U.S. Masters Degree.

In determining whether a U.S. issued degree is a master's degree, adjudicators should consider more than the simple nomenclature of a degree. The fact that a degree is or is not titled as a masters degree is not by itself dispositive. A degree may be titled as "Doctor of ___" but in fact not be a graduate degree at all. For example, in the field of Chiropractic, the entry-level degree is "Doctor of Chiropractic" and a bachelors degree in any field is not required prior to obtaining that degree. On the other hand, attorneys typically hold a "juris doctor" degree, and medical doctors hold a similar "doctor of medicine" degree. Prior to earning either the J.D. or M.D. degree, the holder must first earn at least a bachelors degree in some field. Accordingly, while neither degree is likely equivalent to a Ph.D., a J.D. or M.D. degree would be considered to be equivalent to, if not higher than, a masters degree.

Thus, adjudicators should consider the place that the claimed "masters" degree holds on the academic hierarchy of degrees. Specifically, in order to qualify as a masters degree so as to meet the cap exemption requirement, the degree must be one for which a bachelors degree in any field is required in order to obtain the "masters" degree. This ensures that the "masters" degree is a degree that is at least one level higher than a bachelor's degree, which is the essential component of a "masters or higher" degree.

(2) Qualifying Institution

In addition to meeting the above standard, the claimed masters degree must be issued

from a U.S. institution of higher education as defined in section 101(a) of the Higher Education Act of 1965. That section provides as follows:

> For purposes of this chapter, other than subchapter IV and part C of subchapter I of chapter 34 of Title 42, the term "institution of higher education" means an educational institution in any State that--
>
> (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
> (2) is legally authorized within such State to provide a program of education beyond secondary education;
> (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
> (4) is a public or other nonprofit institution; and
> (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted pre-accreditation status by such an agency or association that has been recognized by the Secretary for the granting of pre-accreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

In order to obtain the H-1B cap exemption for a U.S. Masters' degree or higher, both # 1 (qualifying "masters" degree) and # 2 (qualifying U.S. institution) must be met.

2. The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order, a new entry to read:

AD XX-XX [INSERT SIGNATURE DATE]	Chapter 31.3	Adds guidance relating to the H-1B cap exemption for aliens holding master's or higher degrees from a U.S. institution of higher learning.

VALIDITY PERIODS

- If no license is required by the State (or District of Columbia) the validity period may be one, two, or three years, as appropriate, depending on the exemption stipulated (or not stipulated) by each State during the residency program.

  Example: If no State license is required for:
  - The first year of residency – give them 1 year;
  - The first four years of residency – give them 3 years; or
  - The duration of the residency program (or, conversely, if no time limitations are clearly stipulated) – give them 3 years.

- If the petitioner submits a temporary license, approve the petition for one year or for the period that the temporary license is valid, which ever is longer.

- If a permanent license is provided, the petition may be approved for a period of 3 years.

NEW YORK MEDICAL RESIDENTS: If you adjudicate H1B medical residents from New York, it is okay to grant them periods of up to 3 years. NY does not require a license for the medical residents. Although the NY medical resident may not have a license, HQ has instructed us to grant them up to 3 years since there is no license requirement for medical residents in New York. (Rev. 01-19-07)

Chong, Jenny

From: Speidel, Pam B
Sent: Tuesday, February 04, 2014 10:27 AM
To: Chong, Jenny; Phan, Lethuy; Trinh, Nhut M; Itpick, Gwendolyn L; Hutchens, Rebecca L; Aguilar, Lorri L; Parrish, William F
Cc: Violett, Michael D; Powell, Trevor
Subject: RE: sample validity case
Attachments: VD Ex Instructor Guide.doc; VD Ex.doc; 2008-05-30, HQMemo, Neufeld--AC21.pdf; 2006-12-05, HQMemo, Aytes--PeriodsOfAdm H4&L2 decoupled.pdf

Hello Everyone!

Attached are the validity dates scenarios that we are planning to use for the tomorrow roundtable. Please review and let me know if you have any comments or suggestions. I am also attaching the Policy Memos for your reference.

I am hoping that I did cover all issues as previously discussed in the meeting. I am starting to confuse with so many dates.☺

Thank you,

Pam

From: Speidel, Pam B
Sent: Friday, January 31, 2014 11:05 AM
To: Chong, Jenny; Phan, Lethuy; Trinh, Nhut M; Itpick, Gwendolyn L; Hutchens, Rebecca L; Aguilar, Lorri L; Parrish, William F
Subject: RE: sample validity case

I am working on writing up the validity dates exercises so we can use for the roundtable.

From: Chong, Jenny
Sent: Friday, January 31, 2014 10:59 AM
To: Phan, Lethuy; Speidel, Pam B; Trinh, Nhut M; Itpick, Gwendolyn L; Hutchens, Rebecca L; Aguilar, Lorri L; Parrish, William F
Subject: sample validity case

Hi.

Here is one sample validity scenario we could use to ask the officers:

A change of employer/extension filed on 09/21/2013
The beneficiary's current status expires on 09/29/2013

Start date of the requested validity period from 10/01/2013 to 09/30/2015
Submitted LCA is certified from 10/01/2013 to 09/30/2015

If the petition is otherwise approvable, what would be the correct validity period to grant if we were to adjudicate the case today, 1/31/2014.

Thanks.

(b)(6)

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

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

Validity Dates Exercises

Adjudication Date: 01/31/2014

EOS-Same Employer **No 6 –Year Limit Issues**

1) **LCA:** 10/01/13 to 09/30/16
Petition Dates: 12/15/13 to 09/30/16
H-1B Status Expires: 09/30/2015
Amended/Change in previously approved petition filed on: 12/20/13
Validity Period: _____

2) **LCA:** 06/01/13 to 05/30/16
Petition Dates: 06/30/13 to 05/30/16
H-1B Status Expires: 10/30/13
Amended/Change in previously approved petition filed on: 06/30/13
Validity Period: _____

3) **LCA:** 09/20/13 to 09/30/16
Petition Dates: ASAP to 09/30/16
H-1B Status Expires: 09/10/13
I-94 Expires: 09/20/13
Petition Filed on: 09/01/13
Validity Period: _____

4) **LCA:** 09/01/13 to 09/30/16
Petition Dates: 09/01/13 to 09/30/16
H-1B Status Expires: 09/10/13
Date of Last Arrival on I-94: 01/30/12
I-94 Expires: 06/30/12
Prior I-797 Issued on: 08/30/11
Petition Filed on: 08/30/13
Validity Period: _____

EOS -- Change of Employer

5) **LCA:** 10/01/13 to 09/30/15
Petition Dates: 10/01/13 to 09/30/15
H-1B Status Expires: 09/29/13
Petition Filed on: 09/21/13
Validity Period: _____

COS

6) **LCA:** 10/01/13 to 09/30/16
Petition Dates: 10/01/13 to 09/30/16
Period of Time in H1B status: 10/01/07 to 09/30/11 (5 years)
Period of Time outside the U.S: 08/01/11 to 08/31/11 (30 days)
H-4 Status Expires: 04/20/15
Petition Filed on: 04/20/13
Validity Period: _____

EOS -- Change of Employer

7)	**LCA:**	**06/01/13 to 09/30/14**
	Petition Dates:	**10/1/13 to 09/30/14**
	H-1B Status Expires:	**06/29/13**
	H-1B Status Start Date:	**06/30/07**
	Petition Filed on:	**05/30/13**
	ETA Filed on:	**07/05/12**
	Validity Period:	_____
8)	**LCA:**	**10/01/13 to 09/30/16**
	Petition Dates:	**10/01/13 to 09/30/16**
	H-1B Status Expires:	**09/30/13**
	H-1B Status Start Date:	**10/01/07**
	Petition Filed on:	**08/31/13**
	I-140 Revoked on (auto-revocation):	**10/15/13**
	I-485 Filed on:	**10/01/12**
	Validity Period:	_____

Note: The new job in the same or similar occupational classification as the job for which the prior I-140 petition was filed was offered to the beneficiary.

9)	**LCA:**	**10/01/13 to 09/30/16**
	Petition Dates:	**3 years**
	H-1B Status Expires:	**09/30/13**
	Petition Filed on:	**07/03/13**
	I-140 Priority Date:	**09/08/08**
	Visa is available on:	**01/31/14**
	Validity Period:	_____

Validity Dates Exercises

Adjudication Date: 01/31/2014

EOS-Same Employer **No 6 –Year Limit Issues**

1) **LCA:** 10/01/13 to 09/30/16
Petition Dates: 12/15/13 to 09/30/16
H-1B Status Expires: 09/30/2015
Amended/Change in previously approved petition filed on: 12/20/13
Validity Period: 01/31/14-09/30/16

2) **LCA:** 06/01/13 to 05/30/16
Petition Dates: 06/30/13 to 05/30/16
H-1B Status Expires: 10/30/13
Amended/Change in previously approved petition filed on: 06/30/13
Validity Period: 10/31/13-05/30/16

3) **LCA:** 09/20/13 to 09/30/16
Petition Dates: ASAP to 09/30/16
H-1B Status Expires: 09/10/13
I-94 Expires: 09/20/13
Petition Filed on: 09/01/13
Validity Period: 09/11/13-09/10/16 (Back Dating??)

4) **LCA:** 09/01/13 to 09/30/16
Petition Dates: 09/01/13 to 09/30/16
H-1B Status Expires: 09/10/13
Date of Last Arrival on I-94: 01/30/12
I-94 Expires: 06/30/12
Prior I-797 Issued on: 08/30/11
Petition Filed on: 08/30/13
Validity Period: 01/31/14-09/30/16 (Late Filing, Split Decision??)

EOS -- Change of Employer

5) **LCA:** 10/01/13 to 09/30/15
Petition Dates: 10/01/13 to 09/30/15
H-1B Status Expires: 09/29/13
Petition Filed on: 09/21/13
Validity Period: 01/31/14-09/30/15 (Late Filing, Split Decision)

COS

6) **LCA:** 10/01/13 to 09/30/16
Petition Dates: 10/01/13 to 09/30/16
Period of Time in H1B status: 10/01/07 to 09/30/11 (5 years)
Period of Time outside the U.S: 08/01/11 to 08/31/11 (30 days)
H-4 Status Expires: 04/20/15
Petition Filed on: 04/20/13
Validity Period: 01/31/14-01/30/15 (New 6-year rule)

Adjudication Date: 01/31/2014 6-Year Limitation Issues

EOS -- Change of Employer

7)	**LCA:**	**06/01/13 to 09/30/14**
	Petition Dates:	**10/1/13 to 09/30/14**
	H-1B Status Expires:	**06/29/13**
	H-1B Status Start Date:	**06/30/07**
	Petition Filed on:	**05/30/13**
	ETA Filed on:	**07/05/12**
	Validity Period: 01/31/14-09/30/14	**(AC21-106)**
8)	**LCA:**	**10/01/13 to 09/30/16**
	Petition Dates:	**10/01/13 to 09/30/16**
	H-1B Status Expires:	**09/30/13**
	H-1B Status Start Date:	**10/01/07**
	Petition Filed on:	**08/31/13**
	I-140 Revoked on (auto-revocation):	**10/15/13**
	I-485 Filed on:	**10/01/12**
	Validity Period: 01/31/14-01/30/15	**(Grant 1 yr or 3 yrs?)**

Note: The new job in the same or similar occupational classification as the job for which the prior I-140 petition was filed was offered to the beneficiary.

9)	**LCA:**	**10/01/13 to 09/30/16**
	Petition Dates:	**3 years**
	H-1B Status Expires:	**09/30/13**
	Petition Filed on:	**07/03/13**
	I-140 Priority Date:	**09/08/08**
	Visa is available on:	**01/31/14**

Validity Period: 01/31/14-09/30/16 (AC21-104, Visa is not available at the time of filing)

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 you are requesting consulate/embassy notification, provide the following evidence in duplicate. Any document submitted to the U.S. Citizenship and Immigration Services (USCIS) 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.

H-1B Specialty Occupation

Specialty Occupation means an occupation which requires the theoretical and practical application of a body of highly specialized knowledge and which requires the attainment of a baccalaureate or higher degree or its equivalent, in a specific specialty, as a minimum, for entry into the occupation in the United States.

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

EVIDENCE PERTAINING TO EQUIVALENCE TO COMPLETION OF A COLLEGE DEGREE

RECOGNITION OF EXPERTISE: The petitioner must show that the beneficiary has equivalency AND recognition of expertise. If the petitioner has provided no equivalency evaluations or has provided inadequate evaluations, then the following information should be requested. Generally speaking, this section will read best if it is sent in its complete state. The more text that is cut from this section the less coherent it will be. Read your final RFE carefully to insure that it is clear.

Definition - Equivalency: Equivalence to completion of a United States baccalaureate or higher degree means achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty. The following additional requested information is to assist you to establish that the beneficiary has the equivalent of a United States baccalaureate degree and recognition of expertise in the specialty occupation:

Evaluation of Foreign Education: The evidence indicates that the beneficiary has completed either several courses or a full course of study in a particular subject abroad. Provide the following to establish the level and type of education the beneficiary has obtained abroad and its educational equivalent in the United States:

- Foreign Educational Credentials Evaluation: Submit an advisory evaluation of the beneficiary's foreign educational credentials by a reliable credentials evaluation service that specializes in evaluating foreign educational credentials. This evaluation must address the beneficiary's educational achievements as to equivalent education in the United States including the field of study. An acceptable evaluation should consider formal post-secondary education only and not practical experience. It should also provide a detailed description of the material evaluated rather than conclusions. Further, it should provide a brief description of the qualifications and experience of the evaluator. Additionally, you must include all the documentation provided by the beneficiary for the evaluation and must cite any reference material used by the evaluator.

Evaluation of Training & Experience: You are attempting to establish that the beneficiary qualifies to perform services in a specialty occupation based on a combination of education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, **and** that the beneficiary **has recognition of expertise** in the specialty through progressively responsible positions directly related to the specialty.

OPTIONAL PARAGRAPH - If not applicable, delete: You have provided an evaluation of the beneficiary's foreign educational credentials from a foreign credentials evaluator who claims that the beneficiary has the equivalent of a baccalaureate level of education or higher based on education, training and/or experience. However, this evaluation is insufficient because regulations limit the scope of foreign credential evaluators to evaluating only foreign education. Evaluation of training and/or experience requires the submission of other documents from other sources such as college officials, professional associations, former employers, or recognized experts.

Therefore, provide at least one of the following to establish the level and type of training and/or experience the beneficiary has obtained and its educational equivalent in the United States:

- Evaluation of Training and/or Experience by a College Official: Submit an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty of [insert specialty occupation]. The evaluation must be from an accredited college or university that has a program for granting such credit in the field of study based on an individual's training and/or work experience.

  NOTE:

A private educational credentials evaluation service may not evaluate an alien's work experience or training; because regulations limit the scope of educational credential evaluators to evaluating only foreign education.

Professors writing evaluations as consultants, may, in the alternative, be considered as recognized authorities if they can establish their qualifications as experts; provide specific instances where past opinions have been accepted as authoritative and by whom; show how conclusions were reached; and show the basis for the conclusions with copies or citations of any research material used.

The evaluation should describe the material evaluated and establish that the areas of experience are related to the specialty. Resumes or Curriculum Vitae alone are usually insufficient to satisfy this requirement.

Also, provide a letter from the **Registrar** of the institution (on the institution's letterhead) to establish that the particular evaluating official is authorized to grant college-level credit on behalf of their institution, and that the evaluator holds a bachelor's degree in the field of study he or she is evaluating. Further, provide written verification or other documents or records to clearly substantiate that the evaluator is actually employed by the claimed college or university. Additionally, include evidence that the institution is accredited. [NOTE TO ADJUDICATOR: If school is in SEVIS, it does not necessary mean that the institution is accredited]

Provide copies of pertinent pages from the college or university catalog to show that it has a program for granting college-level credit based on training and/or experience. Merely stating in a letter that the school has such a program is insufficient. The program must be sufficiently substantiated. Further, CLEP and PONSI equivalency exams or special credit programs do not satisfy this requirement because the regulation requires that the beneficiary produce the results of such exams or programs in order for them to qualify. Also, training or experience derived from internship programs may not satisfy this requirement unless you can establish that the experience or training claimed was gained through enrollment in the particular college or university's internship program.

Moreover, provide evidence to show the total amount of college credit the Registrar or evaluator may grant for training or experience as part of the program. The evaluator may provide copies of the evaluation made by a school official, preferably the Registrar, which shows how the alien met the college or university's program requirements and how much possible college credit the alien may be granted for his or her training and experience.

- Equivalency Examinations: Submit 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).

- Certification by a Professional Association: Submit 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.

Evidence for Recognition of Expertise: Submit the following to certify and substantiate that the beneficiary has recognition of expertise through progressively responsible experience that is directly related to the specialty and that the training or experience is equivalent to a degree in the specialty:

- Documentation to Certify Recognition of Expertise: Submit affidavits or declarations (made under penalty of perjury) certifying as to the beneficiary's training and/or experience in the specialty occupation, and that the beneficiary has recognition and expertise in the specialty through progressively responsible positions directly related to the specialty.

  The certification should specifically describe the beneficiary's recognition and ability in factual terms. Merely stating that the beneficiary has recognition of expertise is insufficient. The documentation must state specific facts about the significance of what the beneficiary actually performed that gave him the recognition of expertise. Further, they must set forth the expertise of the affiant and the manner in which the affiant acquired such information.

  Present or former employers: The affidavits or declarations should be on the present or former employer's company letterhead with the dates of employment, and should describe, in detail, the duties the beneficiary performed, and show that the alien's experience was gained while working with peers, supervisors or subordinates who have a baccalaureate degree or higher or its equivalent. Also, evidence of the nature and size of the former employers' businesses should be included.

  Recognized authorities: The affidavits or declarations should be from at least two recognized authorities certifying the beneficiary's training and/or experience in the specialty occupation, and that the beneficiary has recognition and expertise in the specialty through progressively responsible positions directly related to the specialty.

  NOTE: If the beneficiary's has achievements that can be determined to be significant contributions to the field of the specialty occupation, only one recognized authority may need to submit an affidavit or declaration. However, merely stating the beneficiary's achievements are significant without providing supporting

documentation to show the scope of the achievement will, generally, be insufficient to meet this requirement.

A recognized authority means a person or an organization with expertise in a particular field, and the expertise to render the type of opinion requested. Such opinion must state: the writer's qualifications as an expert; the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; how the conclusions were reached; and the basis for the conclusions supported by copies or citations of any research material used.

- Documentation to Substantiate Recognition of Expertise: To substantiate that the beneficiary has recognition of expertise in the specialty, through progressively responsible positions directly related to the specialty, provide copies of all the material evaluated including copies of personnel records, performance evaluations, pay records; or copies of any other documents that reflect promotion or achievement of progressively responsible positions directly related to the specialty. Clearly show how the affiant arrived at his or her determination.

USCIS Determination of Equivalency: If you prefer, USCIS is authorized to make a determination that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience. However, it must be clearly demonstrated that the areas of training and/or experience are related to the specialty and the beneficiary has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the beneficiary lacks. For equivalence to an advanced (or Masters) degree, the beneficiary must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the beneficiary must hold a Doctorate degree or its foreign equivalent.

USCIS has determined that the beneficiary has, at best, accumulated approximately [insert number of equivalent years determined: ___] years of education in the specialty or related field. As such, the beneficiary needs, at least, [insert number of equivalent years needed: ___] additional years of experience in the field.

OPTIONAL: Documentation from prior employers fails to show the progressive responsibility, nature, and description of the duties; who mentored or guided the employee; their educational background; how duties and experience related to the theoretical knowledge needed in the field beyond that of the practical. Thus the first three criteria listed below have not been met. Further, documents relating to the fourth criteria shown below, have not been submitted.

Therefore, provide additional evidence such as copies of affidavits from present or former employers; copies of personnel records, performance evaluations, pay records; or copies of any other documents that reflect promotion or achievement of progressively responsible positions directly related to the specialty that clearly demonstrate that the beneficiary's training and/or work experience included:

1. the theoretical and practical application of specialized knowledge required by the specialty occupation; and

2. that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and

3. progressively responsible work experience; and

4. that the beneficiary has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

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

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

   (c) Published material by or about the beneficiary in professional publications, trade journals, books, or major newspapers; or

   (d) Licensure or registration to practice the specialty occupation in a foreign country; or

   (e) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation. [NOTE: *Merely stating the beneficiary's work is significant or highly significant and such general terms do not meet this requirement. The evidence must clearly substantiate the significance of the beneficiary's achievements.*]

   Recognized authority: A recognized authority means a person or an organization with expertise in a particular field, and the expertise to render the type of opinion requested. Such opinion must state: the writer's qualifications as an expert; the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; how the conclusions were reached; and the basis for the conclusions supported by copies or citations of any research material used.

Completion of the I-129 H-1B Approval Checklist

This is a guide to help determine the appropriate response for each checklist question (YES, NO, or NA) on the I-129 H-1B APPROVAL QUALITY ASSURANCE REVIEW CHECKLIST. Whenever possible, a relevant citation is given from the Immigration and Nationality Act (INA) and/or Title 8, Code of Federal Regulations (8 CFR); also, page number(s) from the I-129 National SOP (SOP), Adjudicator's Field Manual (AFM) or National Background Identity and Security Checks Operating Procedures (NaBISCOP) Handbook is given that contains information about the checklist question. Last, information on policy is given if a question is not clearly defined in these resources.

When answering the questions on the I-129 H1B APPROVAL QUALITY ASSURANCE REVIEW CHECKLIST, keep in mind that the underlying consideration is: "*Was this element of the adjudication addressed properly?*", "*Was the security item performed according to policy and procedure?*", or "*Was this aspect of the process handled correctly?*" The checklist questions dealing with evidentiary, statutory, and regulatory requirements need not be answered literally for the consolidation of data.

If during the Review, a deficiency(ies) is found, it must be articulated in the itemized Comments section at the bottom of the CHECKLIST. The narrative comments written by the Reviewer must be factual and concise; value judgments such as inadequate or insufficient must be avoided; and the comments cannot be derogatory or inflammatory against the Quality Assurance customers. The best, well-written comments do not require the presence of the reviewed file to determine the accuracy of the deficiency(ies).

Proper Filing

1. Was filing properly signed?

See 8 CFR 103.2(a)(1), 8 CFR 103.2(a)(2), 8 CFR 103.2(a)(6), 8 CFR 103.2(a)(7)(i)

Signature. An applicant or petitioner [or requestor] must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner [or requestor], or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an benefit request that is being filed with the USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

All forms of signature are acceptable, including an "X" or a thumbprint.

A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, the beneficiary may sign the petition as a legal representative of the petitioner if he or she is an officer of the corporation. [See Matter of M, 8 I&N Dec. 24 (BIA 1958), Matter of Aphrodite Investments, Ltd., 17 I&N Dec. 530 (Comm. 1980), and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980)] A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, the beneficiary may sign the petition as a legal representative of the petitioner if he or she is an officer of the corporation. [See Matter of M, 8 I&N Dec. 24 (BIA 1958), Matter of Aphrodite Investments, Ltd., 17 I&N Dec. 530 (Comm. 1980), and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980)]

The response should be either Yes or No; N/A is not an acceptable response to this question.

2. Were correct fee(s) received?

See 8 CFR 103.2(a)(1), 8 CFR 103.2(a)(7)(i), 8 CFR 103.7(b)(1)(l)

Every benefit request or other document submitted to the Department of Homeland Security (DHS) must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission. Each benefit request or other document must be filed with fee(s) as required by regulation. Benefit requests which require a person to submit biometric information must also be filed with the biometric service fee in 8 CFR 103.7(b)(1), for each individual who is required to provide biometrics. Filing fees and biometric service fees are non-refundable and, except as otherwise provided in this chapter I, must be paid when the benefit request is filed.

A benefit request which is not signed and submitted with the correct fee(s) will be rejected. A benefit request that is not executed may be rejected. Except as provided in 8 CFR parts 204, 245, or 245a, a benefit request will be considered received by USCIS as of the actual date of receipt at the location designated for filing such benefit request whether electronically or in paper format. The receipt date shall be recorded upon receipt by USCIS.

To determine if the correct fee has been received, look for the date stamp on the right side of the petition and review in CLAIMS.

See INA 214(c)(9)(A), INA 214(c)(12)(A)-(C), ESABSA Public Law 111-230

The current base fee for the I-129 is $325 (as of 5/2/11).
The current ACWIA fee is $1,500 for petitioners with more than 25 full-time equivalent employees, and $750 for petitioners who employ a total of no more than 25 full-time equivalent employees.
The current, one-time, Fraud Prevention and Detection fee is $500.
The current ESABSA (Public Law 111-230) fee is $2000, if applicable.

The ACWIA fee is not required if the petitioner is exempt from this fee requirement.

The fee is not required in the following instances:

- The petitioner is an institution of higher education as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)
- The petitioner is a nonprofit organization or entity related to or affiliated with an institution of higher education, as such institutions of higher education are defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)
- The petitioner is a nonprofit research organization or a governmental research organization, as defined in 8 CFR 214.2(h)(19)(iii)(C)
- The second or subsequent request for an extension of stay filed by the same petitioner for the same beneficiary
- An amended petition that does not contain any request for extension of stay
- The petition is filed to correct a USCIS error
- The petitioner is a primary or secondary education institution [private or public]
- The petitioner is a nonprofit entity that engages in an established curriculum-related clinical training of students recognized at such an institution

<u>Additional Fee for Certain H-1B and L-1 Petitions</u>

On August 13, 2010, President Obama signed into law, with immediate effect, Public Law 111-230, which contains provisions to increase certain H-1B and L-1 petition fees.

Public Law 111-230 requires the submission of an additional fee of $2,000 for certain H-1B petitions and $2,250 for certain L-1 petitions postmarked on or after August 14, 2010, and will remain in effect through September 30, 2014. This fee is in addition to the base processing fee, the existing Fraud Prevention and Detection Fee, and any applicable American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) fee, needed to file a petition for a Nonimmigrant Worker (Form-129), as well as any premium processing fees.

This additional fee applies to a petitioner who employs 50 or more employees in the U.S. with more than 50% of its employees in the U.S. in H-1B or L (including L-1A, L-1B and L-2) nonimmigrant status. Petitioners meeting these criteria must submit the applicable fee with an H-1B, L-1A or L-1B petition filed:

- Initially to grant an alien nonimmigrant status described in subparagraph (H)(i)(b) or (L) of INA section 101(a)(15), or
- To obtain authorization for an alien having such status to change employers.

The response should be either Yes or No; N/A is not an acceptable response to this question.

Eligibility and Evidence

3. **Was filing filed or approved earlier than 6 months before the date of actual need for the beneficiary's services?**

   See 8 CFR 214.2(h)(9)(i)(B)

   The petition may not be filed or approved earlier than 6 months before the date of actual need for the beneficiary's services or training.

   The response should be either Yes or No.

4. **Was filing submitted by an appropriate petitioner?**

   See 8 CFR 214.2(h)(2)(i), 8 CFR 214.2(h)(2)(i)(F), (4)(ii)

   The following entities may file for an H-1B nonimmigrant:

   A United States Employer: A person, firm, corporation, contractor, or other association or organization in the United States, which:

   - Permits a person to work in the United States;
   - Has an IRS tax identification number; and
   - Has employer-employee relationship(s) demonstrated by having the ability to hire, pay, fire, supervise, or otherwise control the work of an employee.

   An Agent: A United States individual or company in business as an agent may file for types of workers who are traditionally self-employed or use an agent to arrange short-term employment with numerous employers.

   An alien may be employed by more than one employer (petitioner) at any given time. This is called concurrent employment. However, a separate petition must be approved for each employer. Also, part-time employment is allowed.
   The response should be either Yes or No.

5. **If seeking to file as a United States employer, was a valid employer-employee relationship established?**

See 8 CFR 214.2(h)(2)(i); (4)(ii); Donald Neufeld memo dated 01/08/2010, Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements

As an employer who seeks to sponsor a temporary worker in an H-1B specialty occupation, the petitioner is required to establish by a preponderance of the evidence that a valid employer-employee relationship will exist between the petitioner and the beneficiary throughout the duration of the requested H-1B validity period.

Right to Control:

The petitioner must demonstrate that the petitioner has the right to control the beneficiary's work, which may include the ability to hire, fire, or supervise the beneficiary. Evidence establishing the right to control is defined as follows:

- 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 the petitioner 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 the petitioner and a client (with whom the petitioner has entered into a business agreement for which the beneficiary will be utilized) that establishes that while the beneficiary is placed at the third-party work site, the petitioner will continue to have the right to control the beneficiary;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of 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 the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of the petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the petitioner's regular business, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;
- A description of the performance review process; and/or
- Copy of the petitioner's organizational chart, demonstrating the beneficiary's supervisory chain.

Maintenance of Initial Employer-Employee Relationship:

The petitioner must submit evidence to document that the petitioner and the beneficiary maintained the employer-employee relationship throughout the H-1B approval period. Evidence establishing maintenance of employer-employee relationship throughout the H-1B approval period is defined as follows:

- Copies of the beneficiary's pay records (leave and earnings statements, 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 the petitioner's 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.

The response should be either Yes or No.

6. **If claiming "in-house" work, was there evidence to demonstrate if the in-house project exists?**

The evidence submitted must establish that a job offer based on an actual position or the prospective employment is legitimate (e.g., employment is not speculative in nature (consulting position)).

Note: Requests for contracts and/or other types of documentation should be made only in those cases where the officer can articulate a specific need for such documentation.

The response should be N/A if the petitioner is not claiming "in-house" work.

7. **Did position offered meet specialty occupation requirements?**

See 8 CFR 214.2(h)(4)(iii)(A)

When dealing with "Extensions of Stay", keep in mind the re-adjudication memo, Addendum 29 in the SOP.

Specialty Occupation:

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

- A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- The degree requirement is common to the industry in parallel positions among similar organizations or the position is so complex or unique that it can be performed only by an individual with a degree;
- The employer normally requires a degree or its equivalent for the position; or
- The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

It is not sufficient to simply establish that a bachelor's degree or higher degree is a minimum for entry into the occupation; the position must require a degree in a specific specialty. [INA Section 214(i)(1)]

Job Description:

The petitioner must provide a detailed description of the job duties to be performed. A Request for Evidence (RFE) can be issued asking for a description in non-technical terminology. Consider all of the information provided by the petitioner in making a decision as to whether or not the position qualifies as a specialty occupation. Keep in mind that it is the duties of the job rather than the title of the job that determine the legitimacy of a specialty occupation.

See SOP dated 09/30/2004 pgs. 5-25 – 5-26

Resources for Determining Specialty Occupation: Occupational Outlook Handbook (OOH) and Occupational Information Network (O-Net).

See SOP dated 09/30/2004 pg. 5-26

Classification in a Specialty Occupation for Nurses. The H-1A nurse program ended on September 1, 1995; however, nurses can be considered under the H-1B classification; see SOP Pg. 5-162 through 5-165. Most nursing positions are not professional and do not require a person with a four-year degree in the specialty occupation. To qualify for H-1B classification, the institution and/or the duties of the position must be exceptional. One must be satisfied that the position requires a four-year degree.

The response should be either Yes or No.

8. Were education/experience requirements met?

See 8 CFR 214.2(h)(4)(iii)(C), (D)

Beneficiary Qualifications:

In order for an individual to qualify to perform services in a specialty occupation, the alien must:

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

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

The response should be either Yes or No.

9. Were state licensure requirements met?

See 8 CFR 214.2(h)(4)(v)

If the occupation requires a state or local license for an individual to fully perform that occupation, an alien seeking H-1B classification in that occupation must have the license prior to approval of the petition. [8 CFR 214.2(h)(4)(v)(A)]

Some states do not issue licenses until the worker is present. In these cases, accept a statement from the state licensing authority stating that a license will be issued to the beneficiary immediately upon arrival in the United States; however, approve these petitions for one year only.

[HQ Memo entitled, Temporary Licensure for H-1B Nonimmigrants, 5/4/1992]
States may allow an individual to fully practice the licensed occupation under the supervision of licensed senior or supervisory personnel in that occupation. If the nature of the duties and the level at which they are performed demonstrate that the alien under the supervision could fully perform the duties of the occupation, H classification may be granted. [8 CFR 214.2(h)(4)(v)(C)]

Physicians to be employed by the Department of Veterans' Affairs (VA) are not required to have a license from the state in which they will work. They may have a license from any state.

An H-1B petition filed on behalf of an alien beneficiary who does not have a valid state license shall be approved for a period of one-year provided that the only obstacle to obtaining state licensure is the fact that the alien cannot obtain a social security card from the Social Security Administration (SSA). Petitions filed for these aliens must contain evidence from the state licensing board clearly stating that the only obstacle to the issuance of state licensure is the lack of a social security card. In addition, the petitioner must establish that all other regulatory and statutory requirements for the occupation have been met. At the time an extension petition is filed by the alien, the ISO should determine that the required license was obtained. If it has not been obtained at that time, the petition should be denied.

Emergency certifications for teachers vary from locality to locality and must be considered on a case by case basis.

If a temporary license is available in the state of employment, and the alien is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted. Where licensure is required in an occupation, approve the petition for one year or for the period that the temporary license is valid, whichever is longer. [8 CFR 214.2(h)(4)(v)(B) and (E)]

See SOP dated 09/30/2004 pg. 5-169

Health Care Worker Certification. As of July 26, 2004, health care workers in the following fields are required to submit evidence of health care worker certification when filing for change of status or extension of stay:

- Registered nurses
- Occupational therapists
- Speech language pathologists and audiologists
- Medical technologists

- Physician's assistants

The response should be N/A if the beneficiary does not require licensure.

10. If requested, was eligibility for a new CAP number verified?

See INA 214(g)(7), 8 CFR 214.2(h)(13)(iii)

An H-1B alien in a specialty occupation or an alien of distinguished merit and ability who has spent six years in the United States under section 101(a)(15)(H) . . . of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) . . . of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

When the beneficiary has already spent six years in the United States as an H-1B nonimmigrant, he or she may not seek extension, change status, or be readmitted to the United States as an H nonimmigrant for a new six-year admission period unless the beneficiary has first lived one year abroad.

The response should be N/A if a new CAP number was not requested.

11. If applicable, was one of the H-1B cap exemptions met?

See INA 214(g)(5)(A)-(C), 214(g)(7), 214(l)(2)(A)

See also the H-1B Data Collection and Filling Fee Exemption Supplement

This section of law refers to the numerical limitations not applied to nonimmigrant aliens employed or who have received an offer of employment at an institution of higher education; or aliens employed or who have received an offer of employment at a nonprofit research organization or a governmental research organization; or aliens who have earned a master's or higher degree from a United States institution of higher education.

See Michael Aytes dated 12/05/2006; Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year.

H-1B "Remainder" Option (CAP exemption)

When the beneficiary who was previously admitted to the United States in H-1B status, but did not exhaust his or her entire period of admission, seeks readmission to the United States in H-1B status for the "remainder" of his or her initial six-year period of maximum admission, rather than seeking a new six-year period of admission. Pending the AC21 regulations, USCIS for now will allow an alien in the situation described above to elect either (1) to be re-admitted for the "remainder" of the initial six-year admission period without being subject to the H-1B cap if previously counted or (2) seek to be admitted as a "new" H-1B alien subject to the H-1B cap.

See Michael Aytes dated 01/29/2007, Public Law 109-477 – Two-Year Extension of Conrad State 30 Program
Conrad Doctors – Not subject to H-1B Cap even if they change employers or occupations

Pub. L. 106-313 American Competitiveness in the Twenty-first Century Act of 2000, 106th Congress, October 17, 2000, 114 Stat. 1251, [S. 2045]

SEC. 114. EXCLUSION OF CERTAIN "J" NONIMMIGRANTS FROM NUMERICAL LIMITATIONS APPLICABLE TO "H-1B" NONIMMMIGRANTS.

The numerical limitations contained in section 102 of this title shall not apply to any nonimmigrant alien granted a waiver that is subject to the limitation contained in paragraph (1)(B) of the first section 214(l) of the Immigration and Nationality Act (relating to restrictions on waivers).

J-1 physicians who are the beneficiaries of a Conrad 20 waiver of the two-year home residence requirement who change status to H-1B may be granted such a change without regard to the cap, and are not counted toward the cap.

The response should be either Yes or No.

12. Was there evidence to support eligibility for AC21 or recaptured time?

See Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants (AFM Update As 05-21), Neufeld Memo dated 05/30/2008 (HQ 70/6.2, AFM Update AD 08-06), 8 CFR 214.2(h)(13)(iii)(A), 8 CFR 214.2(h)(13)(i)(B), 8 CFR 214.2(h)(13)(iii)(B), 8 CFR 214.2(h)(13)(v)

214.2(h)(13)(i)(B)
When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition 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 time limit imposed on the particular H classification. 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. The petitioner shall 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.

214.2(h)(13)(iii)(A)
Alien in a specialty occupation or an alien of distinguished merit and ability in the field of fashion modeling. An H-1B alien in a specialty occupation or an alien of distinguished merit and ability who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15) (H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

214.2(h)(13)(iii)(B)
Alien involved in a DOD research and development or coproduction project. An H-1B alien involved in a DOD research and development or coproduction project who has spent 10 years in the United States under section 101(a)(15) (H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15) (H) or (L) of the Act to perform services involving a DOD research and development project or coproduction project. A new petition or change of status under section 101(a)(15) (H) or (L) of the Act may not be approved for such an alien unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

214.2(h)(13)(v)
Exceptions to Time Limits:

1) Time limitations do not apply to aliens who did not reside continually in the United States and whose employment in the U.S. was seasonal or intermittent or was for an aggregate of six months or less per year. The limitations do not apply to aliens who reside abroad and regularly commute to the United States to engage in part-

time employment. To qualify for this exception, the petitioner and alien must provide clear and convincing evidence. Such evidence shall consist of documents such as arrival and departure records, copies of tax returns, and records of employment abroad.

2) AC21 §106 permits H-1B nonimmigrants to obtain an extension of H-1B status beyond the six-year maximum period, when:
   (a) The H-1B nonimmigrant is the beneficiary of an application for labor certification or an employment based immigrant petition or an application for adjustment of status; and
   (b) 365 days or more have passed since the filing of a labor certification application, Form ETA 750, that is required for the alien to obtain status as an employment based immigrant, or 365 days or more have passed since the filing of the employment based immigrant petition.

The Attorney General is required to grant the extension of stay of such H-1B nonimmigrants in one-year increments, until a final decision is made on the H-1B nonimmigrant's lawful permanent residence.

3) AC21 §104(c) enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. An H-1B nonimmigrant is eligible for this benefit even if he or she has exhausted the maximum six-year period of authorized stay for H-1B nonimmigrants under 8 U.S.C. §1184(g)(4), INA §214(g)(4). The statute states that the beneficiary must:
   (a) Have a petition filed on his or her behalf for a preference status under INA § 203(b)(1), (2), or (3) (an employment based ("EB") petition); and,
   (b) Be eligible to be granted that status except for the per-country limitations.

Any H-1B nonimmigrant who meets the statutory requirements above may be approved as the beneficiary of a request for an extension of H-1B nonimmigrant status until a decision is made on the nonimmigrant's application for adjustment of status.

Recapture of Time:
Time spent out of the United States during the validity period of a petition must be counted toward the alien's maximum period of stay in the United States, if the time spent outside of the United States did not interrupt the alien's employment in the United States. Periods of time spent outside of the United States which are considered to be a normal part of a work year (e.g., vacations, holidays, and weekends) do not interrupt the alien's employment in the United States. Likewise, short work details to other countries for the United States employer do not interrupt the alien's employment in the United States.

Examples of periods of time spent outside of the United States which interrupt an alien's employment in the United States (e.g., do not count against the time limit) include, but are not limited to: maternity leave, extended medical leave, and long-term details to an employment location outside of the United States.

[HQ Policy Memo Limitations in Admissions, March 9, 1994 James A Puleo memo signed by Lawrence J. Weinig, Acting Associate Commissioner]

The response should be N/A if the petitioner did not request dates beyond the beneficiary's six year limit or did not request recaptured time.

Labor Condition Application (LCA)

13. **Prior to filing, was there a LCA certified that was related to the occupation covering the dates and place of employment?**

    See INA 212(n)(1), 8 CFR 103.2(b)(1) and 214.2(h)(1)(ii)(B)

    Review the start of employment date. If the petition is filed more than 6 months prior to the start of employment, the petition can be denied.

    Review the Form ETA 9035 LCA to ensure it meets the following criteria:

    The LCA:
    - Was signed by Department of Labor (DOL),
    - Included DOL certified starting and ending dates,
    - Included a LCA case number,
    - Was filed by appropriate petitioner,
    - Was filed for all locations specified on the petition, and was filed for the position specified on the petition.

    The petition must contain the required, certified LCA at the time of filing. If a valid LCA was not certified prior to filing, the petition should be denied.

    The response should be either Yes or No.

14. **If filing indicated work would be performed in multiple locations, were all work locations covered by the LCA?**

    See INA 212(n)

    The petitioner is required to submit one or more LCA's for all locations where the beneficiary will work.

    The response should be either Yes or No.

15. **Were Standard Occupational Classification (SCO) code and occupational title on LCA consistent with the job duties on the H1B filing?**

    See 8 CFR 214.2(h)(4)(i)(B)(1)

    Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

    The response should be either Yes or No.

16. **Was a detailed list submitted of all USCIS file numbers for beneficiaries who have been approved using the LCA if LCA indicates more than one H1B nonimmigrant being certified for employment?**

    See 8 CFR 214.2(h)(4)(i)(B)(3)
    If all of the beneficiaries covered by an H-1B labor condition application 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 labor condition application using photocopies of the same application.

Each petition must refer by file number to all previously approved petitions for that labor condition application.

The response should be either Yes or No.

Change of Status (COS)/Extension of Status (EOS)

17. At time of filing for EOS, was beneficiary physically present in the United States?

See 8 CFR 214.2(h)(15)

The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each.... When the total period of stay in an H classification has been reached, no further extensions may be granted.

When the beneficiary is not physically present at the time of filing the I-129 petition, the requested extension of stay may not be approved. However, the petition filed on behalf of the beneficiary may be approved on its merits but the request for extension of stay will be denied. (Split decision)

See also SOP dated 09/30/2004 pg. 5-82

If the petitioner wishes that USCIS notify a consulate or port of entry of the beneficiary's status change or extension of stay, he/she/it must provide a second copy of the I-129. The requested change of status or extension of stay should be indicated on the I-129, and the consulate to be notified indicated on the I-824 or cover letter.

The response should be N/A if the petitioner is not requesting EOS.

18. At time of filing, was valid nonimmigrant status maintained?

See 8 CFR 214.1(c)(4), 8 CFR 248.1(b)

If the petition was not timely filed but excusable for one of the reasons listed in 8 CFR 214.1(c)(4) or 8 CFR 248.1, the petition may continue to be processed. Look at the evidence provided to determine if the reason for the gap is excusable.

Ensure that the alien has maintained valid non-immigrant status by applying the following status violation questions:

- Is the alien still employed, receiving training or performing other duties that are required by current status? (If not, he/she is in violation)
- Has the alien accepted unauthorized employment? (If so, he/she is in violation)

The fact that an H or L non-immigrant has filed an application for Adjustment of Status does not disqualify him/her from eligibility for COS/EOS [Dual Intent is allowed; refer to the I-129H-1B National SOP, see Addenda 17 and 31]

See also Thomas Cook's USCIS Memorandum dated 06/18/2001, Travel After Filing a Request for a Change of Nonimmigrant Status

If the beneficiary departed the U.S. during the pendency of the request for a change of status, the request for a change of nonimmigrant status is considered to be abandoned and should have

been denied pursuant to 8 CFR 248.3(g). However, the petition filed on behalf of the beneficiary may be approved on its merits but the request for change of status will be denied. (Split decision)

The response should be either Yes or No.

J1/J2

19. Have 212(e) requirements been met or waived?

See INA 214(l)(1)

A foreign medical graduate beneficiary who receives a waiver under Conrad 30, P.L. 103-416 must fulfill the 3-year employment contract as an H-1B nonimmigrant with the healthcare facility AND in the specified Department of Health and Human Services (HHS)-designated shortage area named in the waiver application. The alien may not apply for any other nonimmigrant classification until that requirement is fulfilled, and failure to do so will result in the alien again becoming subject to the 2-year residency requirement of 212(e).

In order to grant a change of status for a J-1 under Conrad 30, a State Workforce Agency letter concurrent with the Department of State (DOS) recommendation and a CLAIMS generated I-612 approval notice are required.

"Conrad 30" was expanded by Public Law 108-441, to include State as well as Federal Agencies to petition for certain J-1 medical graduates. It is applicable to petitions filed on or after December 9, 2004.

The response should be N/A if the beneficiary is not a J classification.

20. If J1 or J2 subject to 212(e) under PL 94-484, was beneficiary eligible for COS as J1 foreign medical graduate (FMG) or dependent of J1 FMG?

See INA 248(a)(2), 8 CFR 248.2(a)(3), INA 214(l)(2)(A)

Any alien admitted as a nonimmigrant under section **101(a)(15)(J)** of the Act, or who acquired such status after admission in order to receive graduate medical education or training, whether or not the alien was subject to, received a waiver of, or fulfilled the two-year foreign residence requirement of section **212(e)** of the Act is not eligible to change their nonimmigrant status. This restriction shall not apply when the alien is a foreign medical graduate who was granted a waiver under **section 212(e)(iii)** of the Act pursuant to a request made by a State Department of Public Health (or its equivalent) under **Pub. L. 103-416**, and the alien complies with the terms and conditions imposed on the waiver under section **214(k)** of the Act and the implementing regulations at **§** 212.7(c)(9) of this chapter. A foreign medical graduate who was granted a waiver under **Pub. L. 103-416** and who does not fulfill the requisite 3-year employment contract or otherwise comply with the terms and conditions imposed on the waiver is ineligible to apply for change of status to any other nonimmigrant classification...

A J-2 dependent of a J-1 FMG cannot COS to any other nonimmigrant classification except H-4 until the principal fulfills the 3-year commitment as he/she is subject to the same conditions of the waiver as the principal J-1.

FMGs who were granted waivers of the 2-year foreign requirement under either the State or Federal programs are allowed to change status from J-1 to H-1B. The FMG, however, must be otherwise eligible to apply for a change of nonimmigrant status under section 248 of the Act. This includes the requirement for timely filing of the change of status application. The statutory ineligibility for change of status under § 248 continues to apply to FMGs who obtain a § 212(e)

waiver based on exceptional hardship or persecution (e.g., under § 212(e) itself, rather than § 214(l)).

The response should be N/A if the beneficiary was not subject to 212(e) under PL 94-484.

Physician/Health Care

21. If applicable, was there evidence of health care worker certification from the CGFNS, FCCPT or NBCOT?

See INA 212(a)(5)(C)

Any alien who seeks to enter the United States for the purpose of performing labor as a health care worker, other than a physician, is excludable unless the alien presents a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), or a certificate from an equivalent independent credentialing organization (such as the Foreign Credentialing Commission on Physical Therapy (FCCPT) and the National Board for Certification in Occupational Therapy (NBCOT)). The certificate verifies the alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for entry into the United States and are comparable with that required for an American health-care worker. The certificate also shows that the alien has the level of competence in oral and written English to be appropriate for health care work of the same kind in which the alien will be engaged.

The response should be N/A if the beneficiary will be a physician.

22. If a physician performing direct patient care, did he/she have a license, authorization from state of employment, or evidence that neither a license or authorization is needed?

See 8 CFR 214.2(h)(4)(viii)(A)(1)

If a temporary license is available in the state of employment, and the alien is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted. Where licensure is required in an occupation, approve the petition for one year or for the period that the temporary license is valid, whichever is longer.

The response should be N/A if the beneficiary will not be a physician performing direct patient care.

23. If a physician performing direct patient care, did he/she pass all the steps in the USMLE test or receive education in the United States?

See 8 CFR 214.2(h)(4)(viii)(B)(2)

The beneficiary must have passed the Federation Licensing Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) or be a graduate of a United States medical school; ...

By notice published on September 16, 1992, at 57 FR 42755, if the physician is required to pass the FLEX, or the NBME, or the USMLE, he or she must have done one of the following:

a) Passed components 1 and 2 of the Federation Licensing Examination (FLEX); or
b) Passed Parts I, II and III of the National Board of Medical Examiners (NBME); or
c) Passed Steps 1, 2 and 3 of the United States Medical Licensing Examinations (USMLE)

These criteria cannot be combined. To meet H-1B requirements, the physician must have passed all parts of the exams specified by a), b), or c) above. For example, passing Part 1 of the NBME and Steps 2 and 3 of the USMLE would not make a physician eligible for H-1B status.

The Licentiate of the Medical Council of Canada (LMCC), the Canadian medical licensing procedure, is not equivalent to the FLEX.

Foreign medical school graduates who are of national or international renown are exempt from restrictions on direct patient care listed above. They would, however, require licensure and a LCA. [8 CFR 214.2(h)(4)(viii)(C)]

The response should be N/A if the beneficiary will not be a physician performing direct patient care.

24. If a physician performing direct patient care, did he/she possess an ECFMG certificate or receive education in the United States or Canada?

See 8 CFR 214.2(h)(4)(viii)(B)(2)

The beneficiary must also:

- Have competence in oral and written English as evidenced by a certificate issued by the Educational Commission for Foreign Medical Graduates (ECFMG); or
- Be a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

Graduates of Canadian medical schools are considered competent in oral and written English. Therefore, they are not required to take the ECFMG exam. [Memo, from the Commissioner, INS, March 29, 1977]

The response should be N/A if the beneficiary will not be a physician performing direct patient care.

All Categories

25. At time of filing, was passport valid?

See INA 212(a)(7)(B)(i)(I), 8 CFR 214.1(a)(3)

Every nonimmigrant alien who applies for...an extension of stay in, the United States, must establish that he or she is admissible to the United States.... The passport of an alien applying for extension of stay must be valid at the time of application for extension, unless otherwise provided in this chapter, and the alien must agree to maintain the validity of his or her passport and to abide by all the terms and conditions of his extension.

Ensure that the beneficiary maintained passport validity as required by INA 212(a)(7)(B)(i)(I) and 8 CFR 214.1(a)(3)(i) and was valid at the time of filing of the instant extension of nonimmigrant status **or** change of status. The failure to maintain the validity of one's passport constitutes a failure to maintain nonimmigrant status.

The response should be either Yes or No.

26. Were full English translations included for all required documents written in a foreign language?

See 8 CFR 103.2(b)(3)

Any document containing foreign language submitted to USCIS should be accompanied by a full English language translation. In addition, there must be a certification from the translator

indicating that the translation is complete and accurate and attesting to his or her competence as a translator.

Note: Sometimes the keeper of a record will issue an "extract" version of the document. This often happens in countries where the complete document is lengthy and filled with extraneous information. Such official extracts are acceptable, but only if they contain all the information necessary to make a decision on a case. For example, an official extract of a birth certificate which fully identifies the child's parents may be used in support of an application or petition; one which only lists the child's name and date and place of birth may not. Furthermore, only extracts prepared by an authorized official (the "keeper of record") are acceptable. According to the AFM, a summary of a document prepared by a translator is unacceptable. However, for QA purposes, a summary of a document prepared by a translator will be sufficient.

Refer to the Foreign Affairs Manuel (FAM) for information regarding the acceptability of extracts for various countries.

Lack of acceptable translations for documents not required for the adjudication of the application or petition should not be regarded as an error.

The response should be Yes (if translations were included), No (if translations were required, but not included), or N/A (if no translations were required).

27. Were all other decisional requirements met?

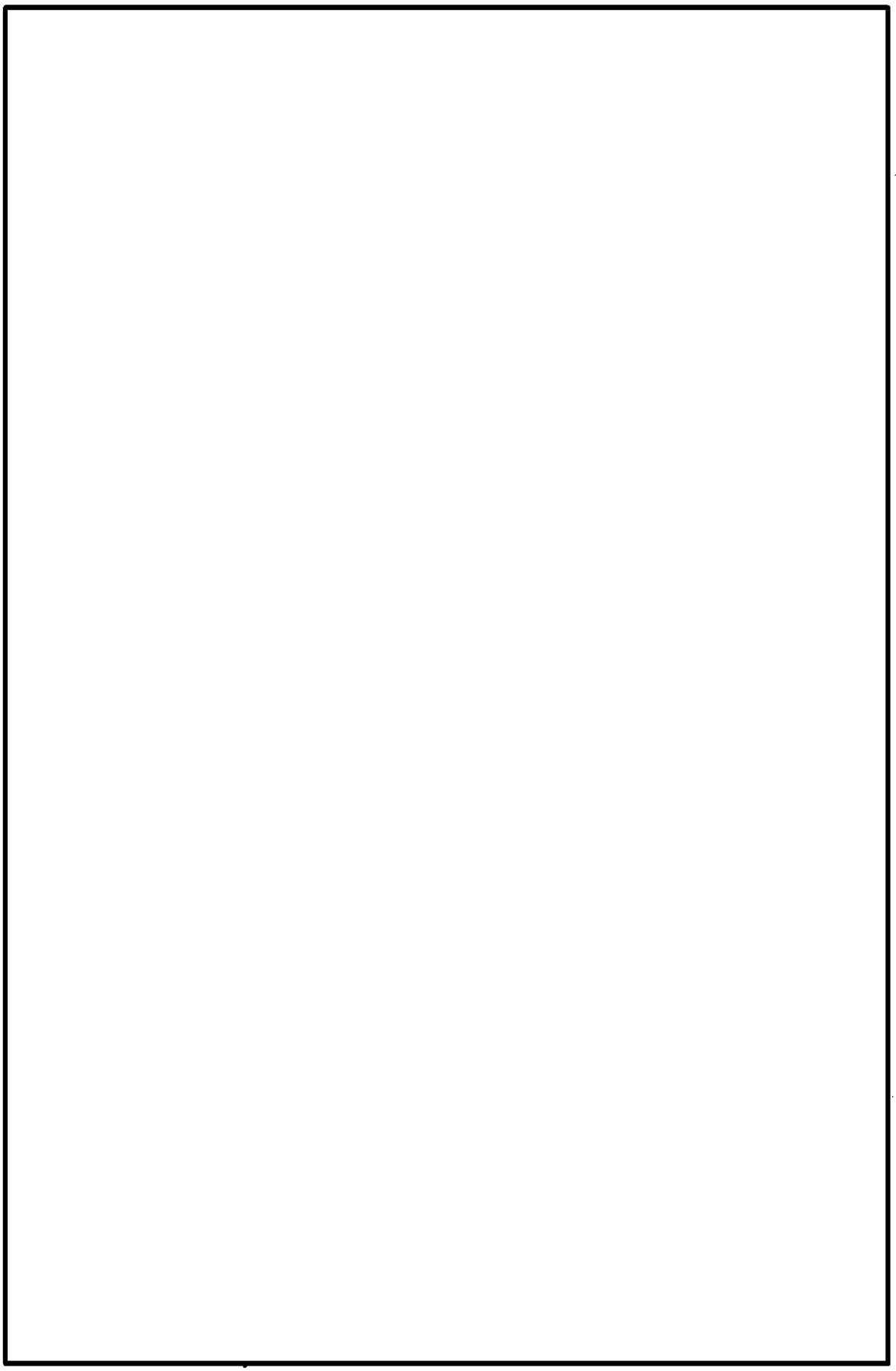
This checklist question will suffice for an identified error that was not covered with the decisional questions 1 through 26. Errors should not arbitrarily be entered under this question. This question is only used when the error identified is not suitable for any other question in this section.

The response should be either Yes or No; N/A is not an acceptable response to this question.

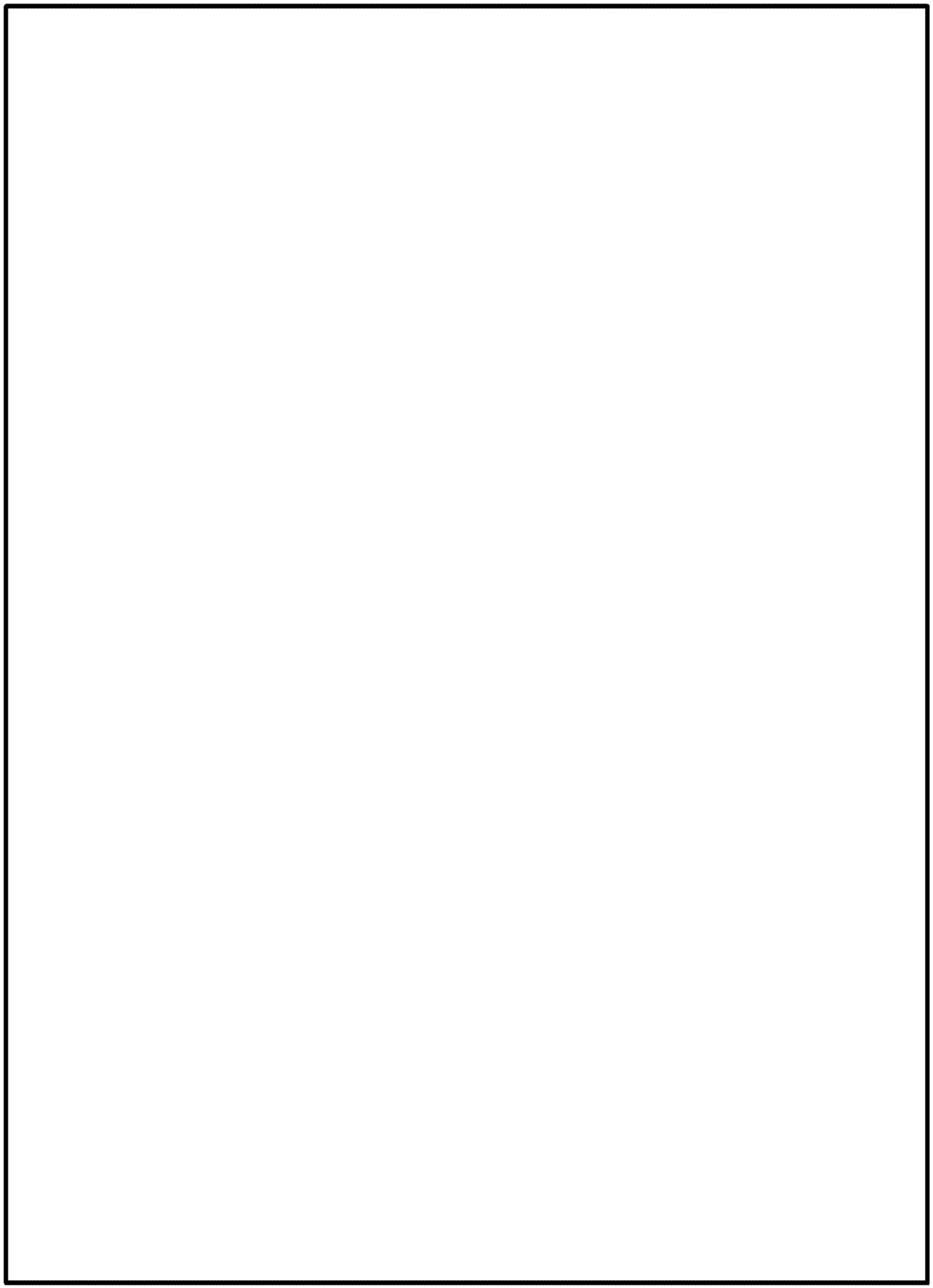
Security Checks

(b)(7)(e)

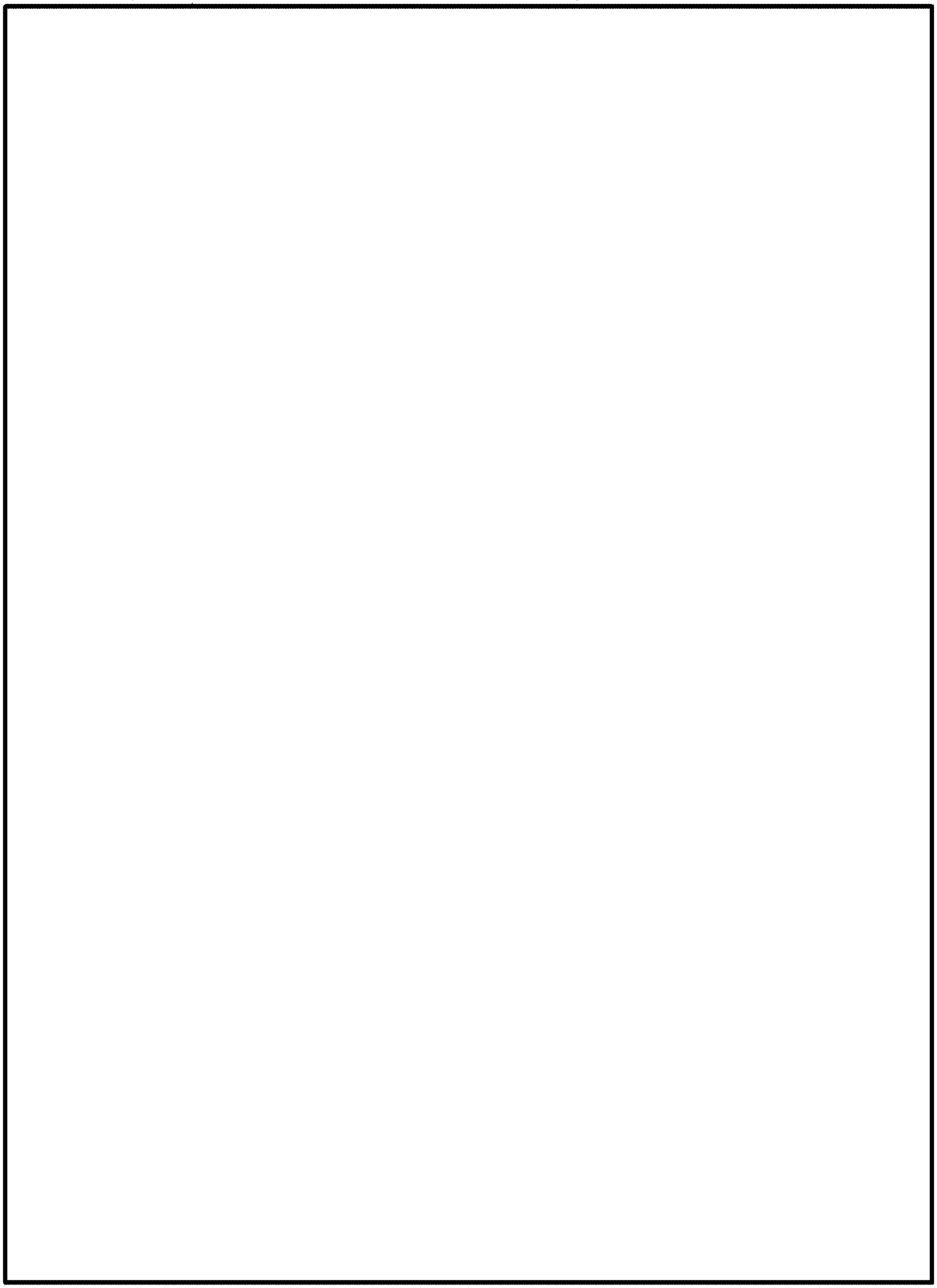
(b)(7)(e)



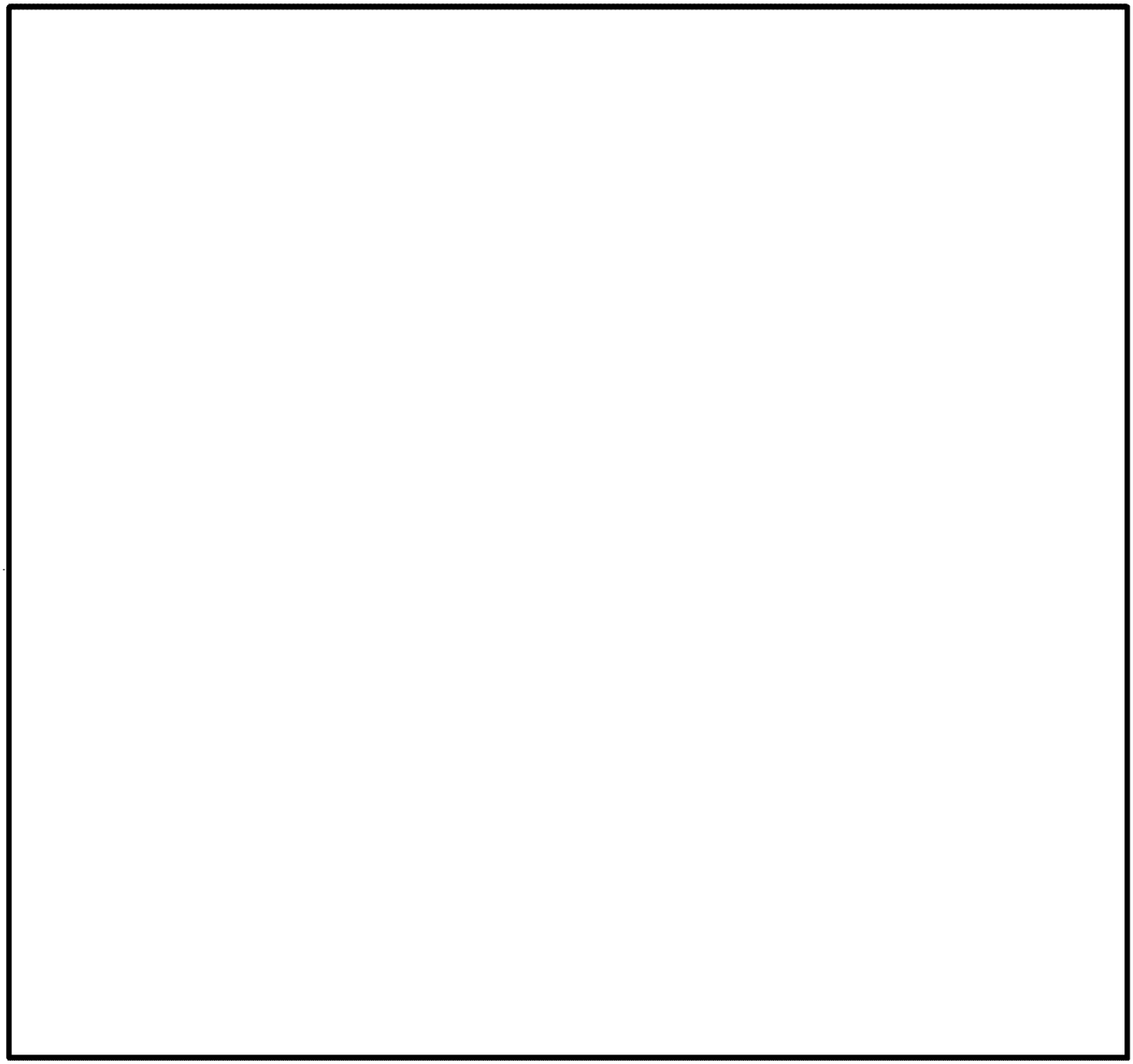
(b)(7)(e)



(b)(7)(e)

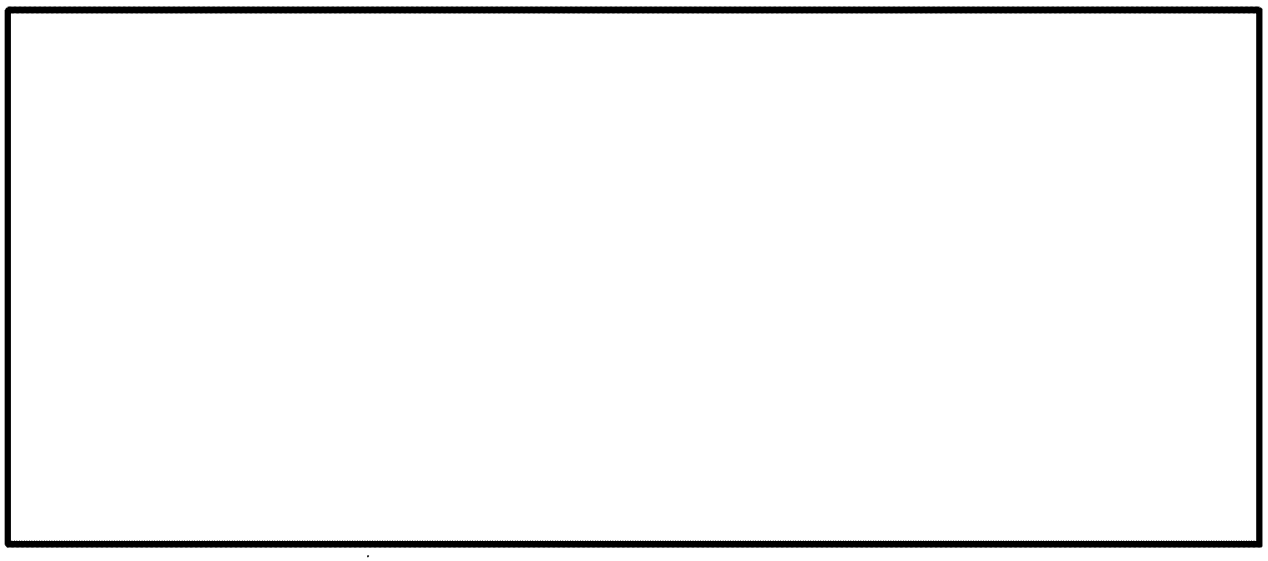


(b)(7)(e)

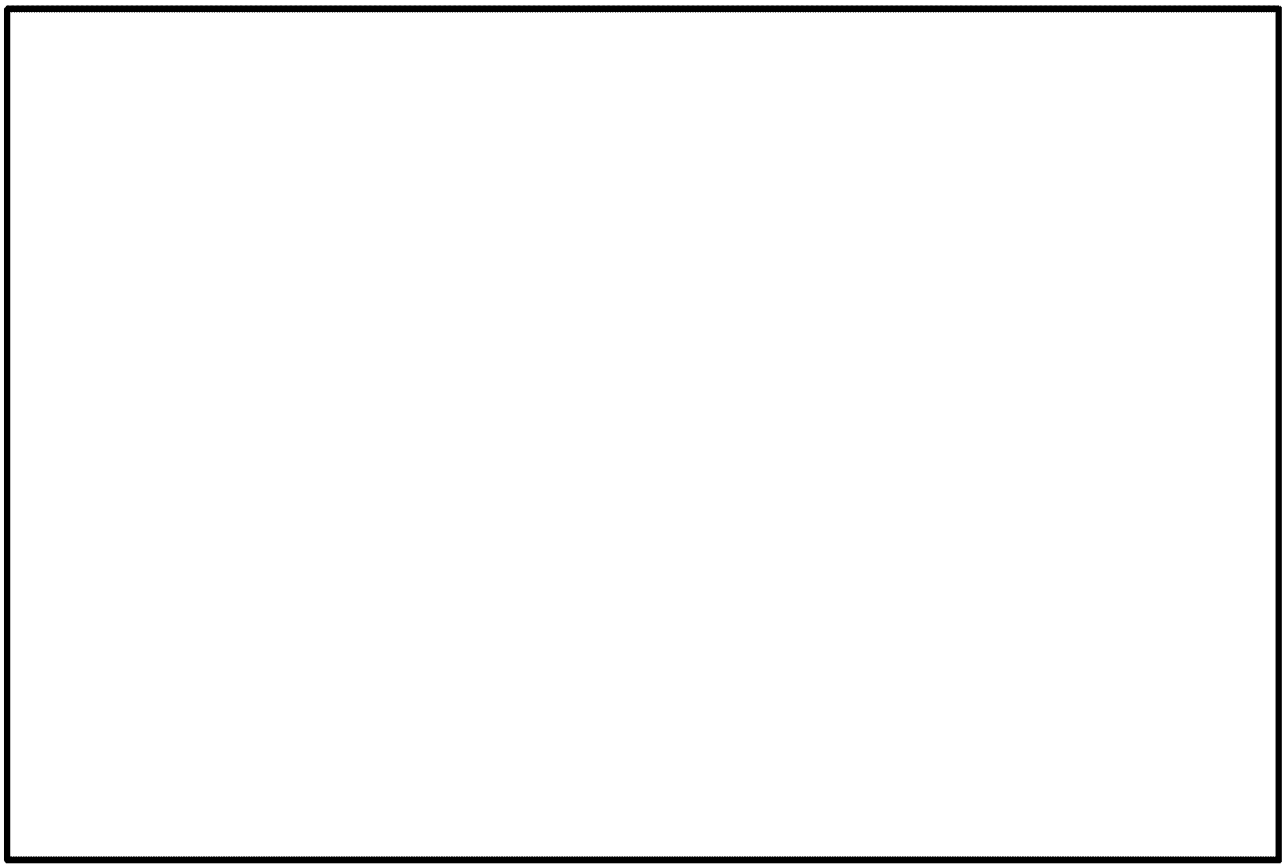


VIBE Checks

(b)(7)(e)



(b)(7)(e)



System Checks (Non-Security)

37. Were all system check requirements met? (e.g., SQ94, AR11, ADIS, SEVIS, US-VISIT, CASEBOOK, etc.)

See William R. Yates memo dated 04/05/2005, Revised Enhanced Processing Instructions and Johnny N. Williams memo dated 03/18/2002, Enhanced Processing Instructions; NaBISCOP modified 02/11/2011

The file must contain evidence of system check(s) if the check was required for a final decision on the case.

An Arrival Departure Information System (ADIS) check must have been done for EOS denials prior to the denial stamp date. The date of final decision is the denial stamp date, NOT the CLAIMS Denial Notice Ordered Date. An ADIS check must have been done for COS denials no more than 15 days prior to the date of final decision. The file must include either a copy of the ADIS printout or a notation indicating the date of the check and that there is no record of the applicant in ADIS system. The response to this question must be YES even if there is an untimely ADIS check in file that was completed for one, or more, of the applicants on the I-129 if it is an EOS Denial. On the other hand, if it is a COS Denial, this question must be marked NO if there is an untimely ADIS check done.

The file may contain an ADIS printout, which shows that no record was found (blank ADIS printout). However, a second check of ADIS may turn up correct ADIS information. This discrepancy is not an error on the officer's part.

ADIS	ADIS check is required as follows, per the most recent interim guidance (March 28, 2013): • All EOS Denials within 15 days • All COS Approvals & Denials within 15 days

AR11 printouts are not required to be placed in the file by the officer. If an address change has been made, the QA reviewer must check AR11 to verify the address change.

The response should be either Yes or No; N/A is not an acceptable response to this question.

38. Does ADIS check indicate that beneficiary is still in the United States?

8 CFR 214.1, 8 CFR 248.1, HQ Office of Programs memo dated 06/18/2001, Travel After Filing a Request for Change of Nonimmigrant Status

An alien beneficiary(ies) must be physically present in the United States at the time of filing the petition for an extension of stay or a change of status. If the alien(s) leaves the United States for business or personal reasons while an extension request is pending, the petitioner may request the Director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa. On the other hand, if the alien(s) leaves the United States for business or personal reasons while a change of status request is pending, the petition may be approved on its merits, but the request for a change of status must be denied due to abandonment.

The response should be N/A if no ADIS check was required.

Endorsements and Notice

39. Are endorsements on filing correct?

See SOP pg. 5-70

Officers must sign an official signature card when they are issued their decision stamp. This is the signature they must use when signing their decision stamp. Refer to 12/26/2002 memo titled: Use of Adjudications Officer's Full Name/Signature on Official Immigration Document. Since QA reviewers do not have access to the signature cards, the decision stamp is properly endorsed if it is signed with the proper date.

Note: Effective with July 1st cases, the decision stamp should be in regular black ink. Any forms stamped with the retired red security ink after the implementation date should be marked as an error. Refer to memo from Gilbert C. Schmelzinger, Chief Security Officer, "Transition to New USCIS Security Ink," dated 04/04/ 2014.

The following endorsements must be present:

- Class
  - "H1B1" for specialty occupations
  - "H1B1" for Trade Agreement with Chile or Singapore
- # of Workers = 1
- Classification Approved block checked
- Occupational Code: refer to the OC list
- If the petition approval is for consulate, POE, or POI notification, the designation must be circled and the location written
- If the petition approval is for an extension in H1B status, the Extension Granted block must be checked

- If the petition approval is for a change of status to H1B, the COS/Extension Granted block must be checked
- The Action Block must be stamped with the decision stamp and endorsed with the officer's signature
- Other endorsements, such as those involved with a Split Decision, should be annotated on the front of the petition (most generally in the Remarks block)

Any other issues related to endorsements not listed should be addressed under this question.

The response should be either Yes or No; N/A is not an acceptable response to this question.

40. Is information in CLAIMS/GUI correct?

Please note that for National QA purposes, all biographical information in CLAIMS must be correct for completions regardless of whether it is for an approval or denial. This information may include the petitioner, beneficiary or applicant's name, address, A-number, Date of Birth, gender, Class of Admission, Country of Birth, validity dates/period, etc.

The following CLAIMS information must be correct and, if applicable, must match the information on the filing and in the CIS 9101 screen (add for forms producing a document):

- Petitioner's and Beneficiary's name
- Petitioner's address
- Beneficiary's Date of Birth, Country of Birth, and I-94 number
- The approval screen information:
  - validity dates
  - classification must be entered as 1B1
  - paragraph text selection must be correct
- Fee – the fee must be correct. New ACWIA fee as of December 8, 2004 is:
  - $1,500 for employers with 26 or more employees
  - $750 for employers with no more than 25 employees

The fee is not required in the following instances:

- The petitioner is an institution of higher education as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)
- The petitioner is a nonprofit organization or entity related to or affiliated with an institution of higher education, as such institutions of higher education are defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)
- The petitioner is a nonprofit research organization or a governmental research organization, as defined in 8 CFR 214.2(h)(19)(iii)(C)
- The second or subsequent request for an extension of stay filed by the same petitioner for the same beneficiary
- An amended petition that does not contain any request for extension of stay
- The petition is filed to correct a USCIS error
- The petitioner is a primary or secondary education institution [private or public]
- The petitioner is a nonprofit entity that engages in an established curriculum-related clinical training of students recognized at such an institution

- G-28 information (Attorney name and address)
- The "... Notice Ordered" and "...Notice Sent" updates are properly completed

NSC Policy: Officers are not required to change the address on the form to match CLAIMS in the event of a post-filing address change. (Added or omitted depending on form type).

If a valid G-28 is in the file but the information is not in CLAIMS/GUI, OR if there is G-28 information in CLAIMS/GUI but there is no G-28 in the file or the G-28 is not valid (e.g., not signed by the petitioner and/or representative), the error should be counted under this question.

Any other issues related to CLAIMS/GUI not listed should be addressed under this question.

Note: If a correction to the filing name and/or date of birth was not changed in CLAIMS, count the error under question 41; do not count the same error again under this question.

The response should be either Yes or No; N/A is not an acceptable response to this question.

41. Was decision updated in appropriate system within 3 (for approvals) or 5 (for denials) business days of stamp date?

See 12/15/2010 Donald Neufeld memo re: Updating Decisions in USCIS Systems

Approvals must be updated in the appropriate system within 3 business days of the decision stamp date.

Denials must be updated in the appropriate system within 5 business days of the decision stamp date.

The response should be either Yes or No; N/A is not an acceptable response to this question.

42. If a correction to the filing name and/or date of birth was required, was it changed on the form and/or system? *(If applicable, answer question 29; if N/A, answer N/A to question 29)*

See 9/13/2005 HQ memo Naming Conventions; Use of Full Legal Name on All USCIS Issued Documents; AFM 51.4

If a change is made to the name or date of birth on the filing, it must be changed in CLAIMS/GUI or other appropriate system(s). No changes to the name are required other than to correct errors for forms that do not produce a document (e.g. typos, first and last names reversed). If applicable, the name and/or date of birth changes must also be reflected in the Central Index System (CIS).

The response should be N/A if no changes were required.

43. Are validity dates correct?

See INA 214(g)(4), Donald Neufeld memo dated 05/30/2008 'Revisions Adjudicator's Field Manual (AFM)'

See also SOP pgs. 5-63 thru 5-65, 5-71 -- 5-79

The validity start date must be:

- The date of adjudication if there is a change of employer; or
- One day after the validity end date for the previously approved period of H-1B employment if the petition was filed for continued employment with the same employer

The validity end date must be the:

- The end date listed on the petition, the end date listed on the LCA, or 3 years from the start date whichever is earliest; or
- One year from the start date if the petition was filed for employment after 6 years. CSC accepts petitions filed for a 7th year extension if it is filed no more than 180 days prior to the alien reaching 6 years in H-1B status. The petition can be approved for time up to the 6th year limit and an addition year (7th) year, as long as the total extension time

does not exceed 3 years and the ending date does not exceed the end date listed on the petition and/or LCA.

If the beneficiary has, for example, 5 months left before reaching the 6th year limit, and is also eligible for a 7th year H-1B extension, CSC will grant an extension request for 1 year and 5 months. A 7th year extension may be granted if a LCA or I-140 petition was filed 365 days prior. If the LCA has been approved and the I-140 petition has not yet been filed, then the LCA must still be valid.

Time Limits:

Non-immigrant specialty occupation employees and fashion models are limited to 6 years in combined H and L status and no petition can be approved for more than 3 years at a time. Aliens employed under the Department of Defense (DOD) specialty are limited to 10 years in combined H and L status and no petition can be approved for more than 5 years at a time ("H and L status" includes H-2, H-3, H-4, L-1 and L-2).

Exceptions to Time Limits:

1) Time limitations do not apply to aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of six months or less per year. The limitations do not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and alien must provide clear and convincing evidence. Such evidence shall consist of documents such as arrival and departure records, copies of tax returns, and records of employment abroad.
2) The 21st Century Department of Justice (DOJ) Appropriations Act amends §106(a) of AC21 to permit H-1B nonimmigrants to obtain an extension of H-1B status beyond the 6 year maximum period when:
   (a) 365 days or more have passed since the filing of any application for labor certification; Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or
   (b) 365 days or more have passed since the filing of an EB immigrant petition.

   The Attorney General is required to grant the extension of stay of such H-1B nonimmigrants in one-year increments, until a final decision is made on the H-1B nonimmigrant's lawful permanent residence. Officers are not to send RFE's requesting that an I-140 and/or an I-485 be filed.
3) AC21 § 104(c) enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. An H-1B nonimmigrant is eligible for this benefit even if he or she has exhausted the maximum six-year period of authorized stay for H-1B nonimmigrants under 8 U.S.C. § 1184(g)(4), INA §214(g)(4). The statute states that the beneficiary must:
   - have a petition filed on his or her behalf for a preference status under INA § 203(b)(1), (2), or (3); and
   - be eligible to be granted that status except for the per-country limitations.

Any H-1B nonimmigrant who meets the statutory requirements above may be approved as the beneficiary of a request for an extension of H-1B nonimmigrant status until a decision is made on the nonimmigrant's application for adjustment of status.

See also Donald Neufeld memo dated 05/30/2008 'Revisions to Adjudicator's Field Manual (AFM).' This memo has recently changed portions of the above information, particularly if an employment immigrant petition has been filed, approved, or has not been filed.

Recaptured Time:

Due to the settlement in the court case Ramirez v Polous (CV 02-2811 ER) (USDC-C.D.CA Oct 7, 2002), H-1B aliens can recapture their vacation time outside of U.S. as long as they can provide evidence. CSC is the only Service Center that is bound by this decision.

The beneficiary is entitled to recapture any time spent outside the United States. In most cases, the attorney or petitioner will submit a statement detailing the dates when the beneficiary was outside the United States. The statement must be supported with documentation, such as copies of the beneficiary's passport showing entry and exit stamps. ADIS can also be checked to confirm dates of exit and reentry.

The new validity date for approved EOS cases should be calculated from the end date of the prior I-797 approval notice because the date shown on the I-94 includes a ten day grace period which is not authorized for employment.

The response should be either Yes or No; N/A is not an acceptable response to this question.

44. Is the classification correct?

Depending on the classification requested, the class entered in CLAIMS 3 and annotated on the petition will be "1B1."

The response should be either Yes or No; N/A is not an acceptable response to this question.

45. Is file in proper ROP order?

See Records Policy Manual (RPM)

ROP order for an I-129 approved/denied on initial submission or after RFE/ITD from top to bottom is as follows:

	Left-hand Side	**Right-hand Side**
Top	G-28	Resolution Memorandum (if applicable)
	Petition	ROIT
	Initial evidence • Cover letter • Other supporting documentation • Envelope (or part of) showing address and postmark	Miscellaneous screen prints, checklists, or correspondence
Bottom	RFE/ITD Notice and response	Unacceptable G-28

The right-hand side of the file should be in reverse chronological order; unless the TECS Memo and/or ROIT documents have been refreshed then they should be moved to the top of the file.

Additional material may be added to the file, particularly on the right-hand side, post-adjudication. This may include processing worksheets, returned notices or correspondence. This should not be recorded as a ROP error unless the material is placed on the wrong side of the file.

TSC Policy:
The Record of Proceeding (ROP), from top to bottom, for TECS:

If a resolution is received on a case that is staying in its file jacket, place the TECS and Non-TECS resolution documents on the non-record side of the file as follows:

1. Resolution Memo
2. ROIT
3. TECS Manifest print-out
4. Non-TECS Referral Sheet

Note: Regardless if the petition is approved or denied, evidence received in response to a request for evidence must never be incorporated into the original submission of evidence. All envelopes must be kept at the back of each petition/correspondence packet with which they were received.

CSC Policy (March 2014):
The contractor will clamp the duplicate copy of the I-129 for KCC to the non-record side of the file.

The response should be either Yes or No; N/A is not an acceptable response to this question.

46. Were all other non-decisional requirements met?

This checklist question will suffice for an identified error that was not covered with the Processing questions 37 through 45. Errors should not arbitrarily be entered under this question. This question is only used when the error identified is not suitable for any other question in this section.

The response should be either Yes or No; N/A is not an acceptable response to this question.

QA Results

47. Decisional – D

The response must be Pass if the answer to questions 1 – 27 was Yes or N/A.

The response must be Reject if any answer to questions 1 – 27 was No.

48. Security Checks – S

(b)(7)(e)

49. VIBE – V

50. Non-Decisional – ND

The response must be Pass if the answer to questions 37 – 46 was Yes or N/A.

The response must be Reject if any answer to questions 37 – 46 was No.

Form I-129 H-1B Adjudication

January 2011

Agenda Training Matters

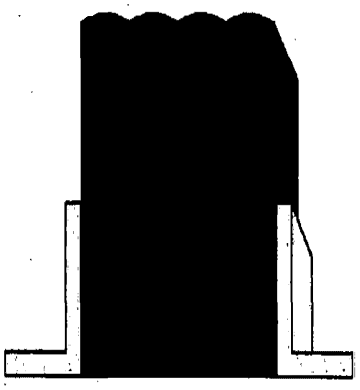
- Introduction
- Fees
- The Cap
- The Definition of an H-1B Nonimmigrant Worker
- Petitioner Requirements
- Beneficiary Requirements

Agenda Training Matters

- Labor Condition Application
- Four Categories of 6-Year Exceptions
- Things to Know
- Summary

Sources of Information for H-1B Adjudication

- Immigration and Nationality Act
  - Sections 101, 212, 214
- Title 8 Code of Federal Regulations
  - Parts 103, 214, 248
- Free-standing Acts & Legislation
  - AC21
- Adopted Decisions
- Memos, policies



Fees

The base fee for the Form I-129

=

$325

Fees

The fee for premium processing of Form I-129

=

$1,225

Fees

P.L. 111-230 effective 8/13/2010 contains provisions to increase certain H-1B and L-1 petition fees.

- $2,000.00 for H-1B
- $2,250.00 for L

The additional fee applies to a petitioner who employs 50 or more employees in the U.S. with more than 50% of its employees in H-1b or L status.

- Applies to initial and new concurrent H & L filings, or
- To obtain authorization for an alien having such status to change employers.

Fees

The H-1B Visa Reform Act of 2004, enacted on December 8, 2004, imposes two additional fees to the I-129 for H-1B classification:

1. Reinstitutes and increases the fees originally imposed by the American Competitiveness And Workforce Improvement Act of 1998 (ACWIA)

Fees

- This fee is used for scholarships for low- income students and job training for U.S. workers.

- U. S. employers with 26 or more full-time equivalent employees, including all affiliated and subsidiary entities, must pay an additional

$1,500.00.

Fees

- U.S. employers with 25 or fewer full-time equivalent employees, including all affiliated and subsidiary entities, must pay an additional

$750.00

Exceptions

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a)
- Nonprofit organizations or entities related to or affiliated with institutions of higher education
- Nonprofit research organizations or governmental research organizations
- Primary or secondary educational institutions, private or public

Exceptions

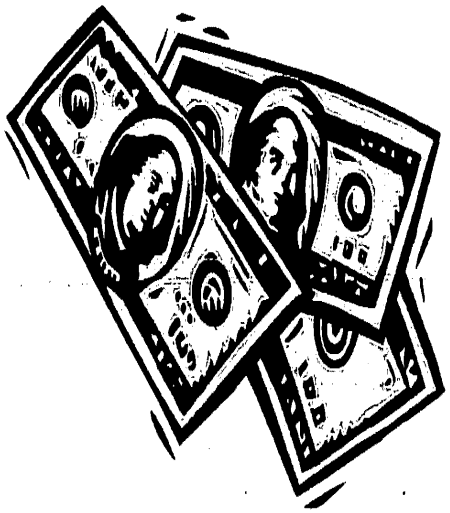
- Amended I-129 petition
- I-129 petition filed for the purpose of correcting a USCIS error
- Second or subsequent extension by the same employer for the same employee

Fees

❷ Creates a new Fraud Prevention and Detection fee of **$500.00**

This fee is for the initial approval of an H-1B (or L) employee by a U.S. employer.

There are no exceptions to the Fraud Prevention and Detection Fee.



The 'Cap' & Numerical Limitations

The total number of temporary workers who were issued initial visas or otherwise provided nonimmigrant status for H-1B classification in fiscal year 2009 was 65,000. The same amount is applicable to fiscal year 2011.

This amount only applies to the principal alien and not to the spouse and children of the alien.

Numerical Limitations

- Of the available 65,000 visas,
  - 1,400 visas are designated for nationals of Chile under the U.S.-Chile Free Trade Agreement, and
  - 5,400 visas are designated for nationals of Singapore under the U.S.-Singapore Free Trade Agreement.
- Reduces the overall visa amount to 58,200 for H-1B classification.

Numerical Limitation Exceptions Masters CAP

- Beneficiaries that have earned a master's or higher degree from a U.S. institution of higher education will be in a Masters CAP until the number of visas exceeds 20,000

- This is a separate CAP from the general CAP of 65,000.

- This CAP is completed before the general CAP. Any surplus over the 20,000 is then added to the general CAP

Numerical Limitations

- In fiscal year 2008 and 2009 the numerical cap was reached immediately. A lottery was conducted to determine which petitions would be accepted for filing.
- Petitions not selected in the lottery were rejected.
- Duplicate petitions (same petitioner and beneficiary) were denied.
- In 2010, a lottery was not needed. The CAP was reached on 12/21/09

The 'Cap' & Numerical Limitations

- Petitioners may not file a petition more than six months prior to employing the alien.

- The first date to file for the fiscal year which starts October 1 is April 1 of that year.

Numerical Limitation Exceptions – Petitioners not subject to the CAP INA 214(g)(5)(A) and (B)

8 CFR 214.2(h)(19)(iii)(B) – 2 Prongs

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a), or related or affiliated nonprofit entity

- Nonprofit research organizations or governmental research organizations

Petitioners as CAP Exempt entities

UNIVERSITY	Gov. Research Org.	Non-Profit Research Org.
Beneficiary	Beneficiary	Beneficiary

- These entities are CAP exempt – no affiliation needed
- The beneficiary can work offsite as long as the employer-employee relationship is maintained
- Let's define these three entities

Institutions of Higher Education defined by the Higher Education Act of 1965

- Defined as those that admit students holding a high school diploma (or equivalent)
- Are certified to provide higher education pursuant to state regulations and are accredited by a nationally recognized accrediting agency
- Provide an educational program that awards a bachelor's degree or a two-year program that awards credit toward such degree
- Qualify as a public or nonprofit institution.
- In other words, a college/university

What is a Research Organization?

A nonprofit research organization or government research organization is one that is primarily engaged in basic research and/or applied research

Non-Profit/Government Research

Basic Research defined:

- Basic research is general 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.

Non-Profit/Government Research

Applied research defined:

- 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.
- It may include research and investigation in the sciences, social sciences, or humanities.

Suggested Evidence For verification of a Research Organization

- Organization Document submitted to IRS – 501(c)(3) (along with the 1023 – NP doc application for exemption status)
- 990 non-profit tax return
- Any documentation showing their primary research mission, such as charitable, religious, educational or scientific purpose.
- Internet references of the petitioner on Secretary of State and Attorney General websites that show public charitable orgs.

Institution of Higher Education OR

A related or affiliated nonprofit entity

In certain instances, nonprofit petitioners that are not themselves a qualifying institution also can claim a CAP exemption through an affiliation or connection with a CAP exempt institution

Institution of Higher Education Affiliations

"or related or affiliated nonprofit entity":

When determining an affiliation, USCIS uses 8 C.F.R. 214.2 (h)(19)(iii)(B) which states:

that an affiliated or related nonprofit entity is a non profit entity that is connected or associated with an institution of higher education through one or more of the following three prongs

"...affiliated nonprofit entity" 3 prongs

Prong 1 - The petitioner is associated with an institution of higher education, through shared ownership or control by the same board or federation;

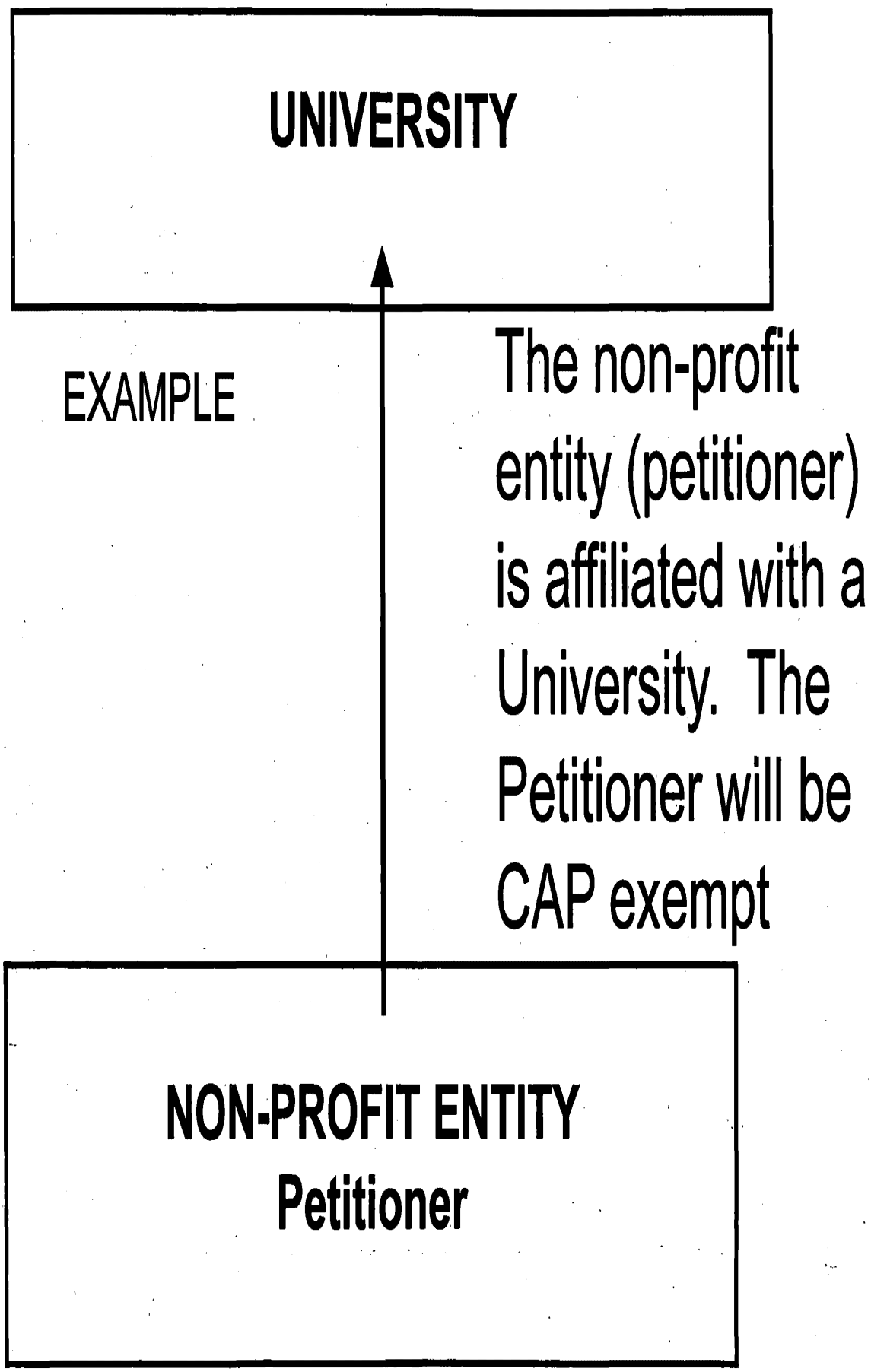
Prong 2 - Operated by an institution of higher education or;

Prong 3 - Attached to an institution of higher education as a member, branch, cooperative, or subsidiary

Cooperative

A business organization owned and operated by a group of individuals for their mutual benefit.

A group persons united voluntarily to meet their common economic goals, through a jointly owned and democratically controlled enterprise


UNIVERSITY
EXAMPLE
The non-profit entity (petitioner) is affiliated with a University. The Petitioner will be CAP exempt
NON-PROFIT ENTITY
Petitioner

Beneficiary Employed "at" a CAP Exempt Employer

Sections 214(g)(5)(A) and (B) of the Act (Section 103 of AC21) exempt an alien from the H-1B cap if the alien is employed (or has received an offer of employment) "**at**"

- *an institution of higher education,
- *a related or affiliated nonprofit entity,
- *a nonprofit research organization, or
- *a governmental research organization

*hereinafter referred to as a "qualifying institution

Third Party Petitioner

- The petitioner itself is not CAP exempt
- The beneficiary is not working exclusively at the petitioner's site, but rather is working "AT" a CAP exempt entity (qualifying institution).
- This type of petitioner is known as a **Third Party Petitioner**

Third Party Petitioners

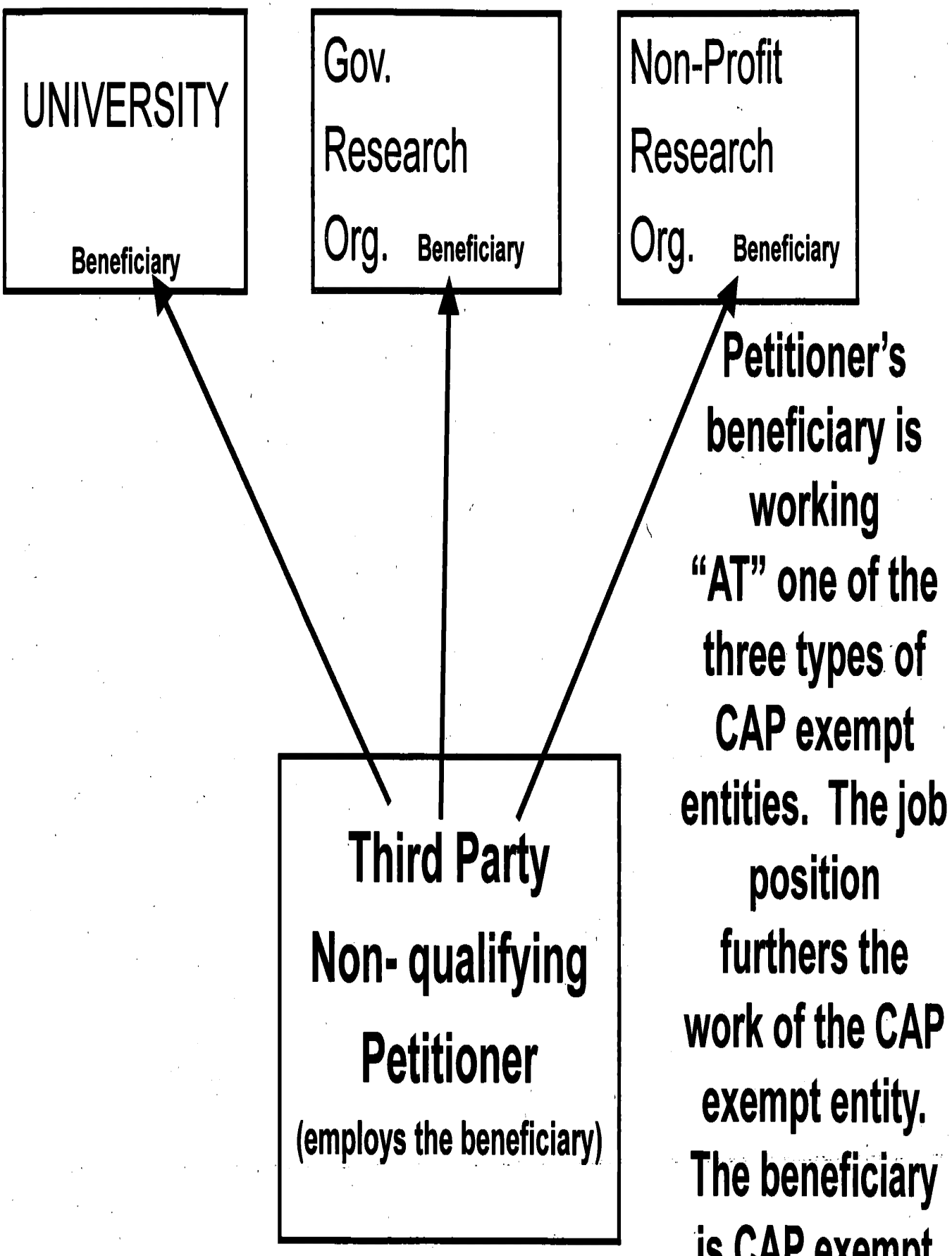
The 06/06/2006 Aytes H-1B Cap exemption memo provides guidance on a third party entity claiming exemption based on employment or an offer of employment "**AT**":

- An institution of higher education or a related or affiliated non-profit entity,
- A nonprofit research organization, or
- A governmental research organization

Third Party Petitioners

The petitioner will employ and pay the beneficiary, but the beneficiary will work at the site of the cap exempt entity. Four conditions to satisfy that the beneficiary will be CAP exempt:

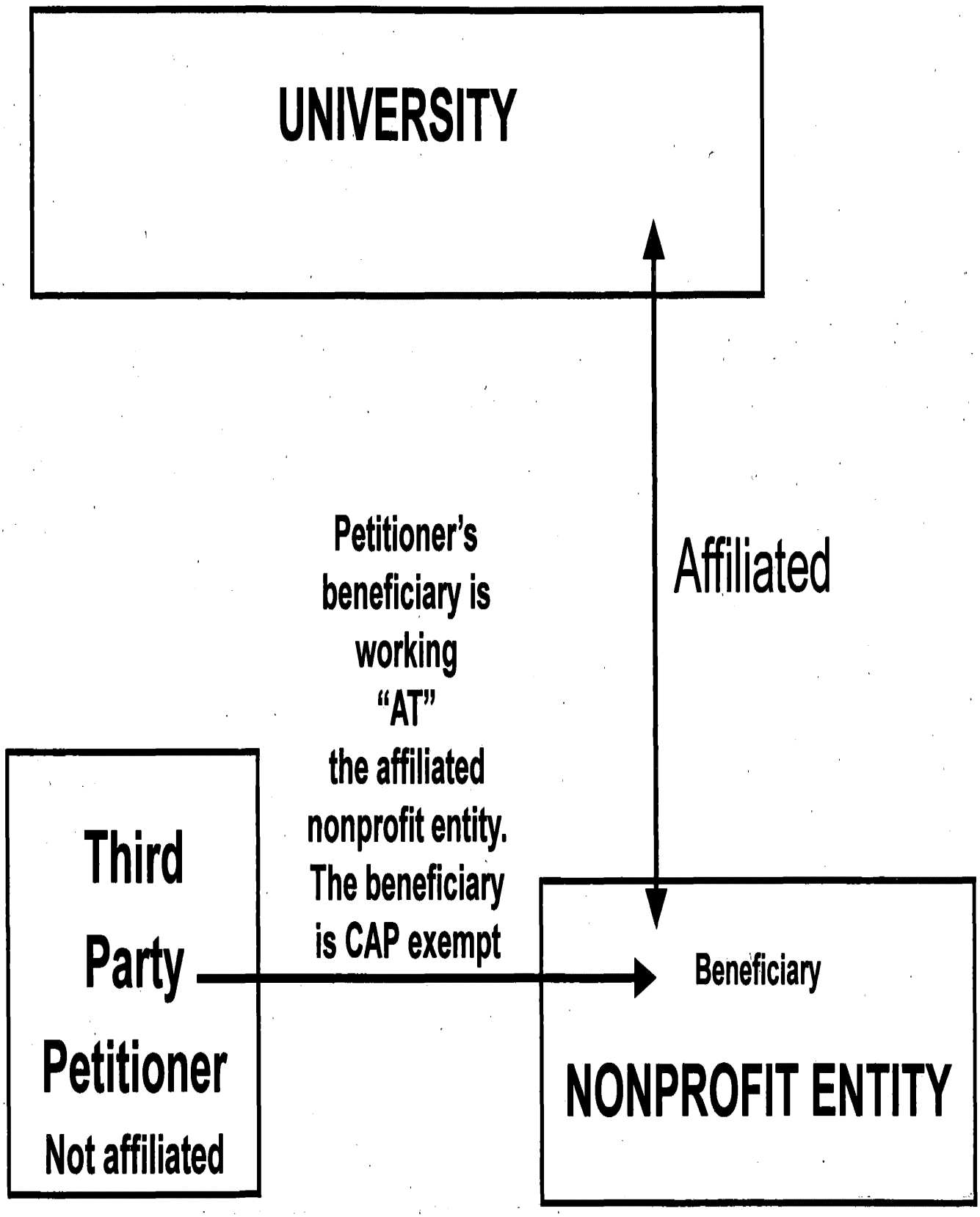
- The beneficiary must be working "at" a qualifying institution at least part of the time
- The job position "at" a qualifying institution must directly and predominately further the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution and
- The position and beneficiary must qualify as an H1B.
- The third party petitioner must retain an employer - employee relationship (right of control)


UNIVERSITY
Beneficiary
Gov. Research Org. Beneficiary
Non-Profit Research Org. Beneficiary
Third Party Non- qualifying Petitioner
(employs the beneficiary)
Petitioner's beneficiary is working "AT" one of the three types of CAP exempt entities. The job position furthers the work of the CAP exempt entity. The beneficiary is CAP exempt

Works "AT" a non-profit affiliated entity

- The third Party petitioner's beneficiary can work "AT" a non-profit affiliated CAP exempt entity

- The petitioner must prove the beneficiary will be working at an entity that qualifies as a non-profit affiliated entity



The nonprofit entity is a member, branch, subsidiary, or cooperative of the university. It is CAP exempt

Third Party Affiliation Exemptions Summary...

- The nexus (connection) - The petitioner must demonstrate and document how the beneficiary's duties are directly and predominantly related to and in the furtherance of, the normal, primary, or essential purpose, mission, objective or function of a university or its non-profit affiliate, or a non-profit research organization or a governmental research organization

- Note that the exemption is created by the beneficiary being "**AT**" the qualifying entity's location.

Aytes Memo – 6/6/2006

- The Aytes Memo is the current guide to follow when adjudicating affiliation petitions.

  EXCEPT: The examples that say the bene must be working at least 51% of the time at the qualifying institution. This is no longer a requirement

- A new memo is coming from HQ in the near future.

AAO Decision – Garland ISD

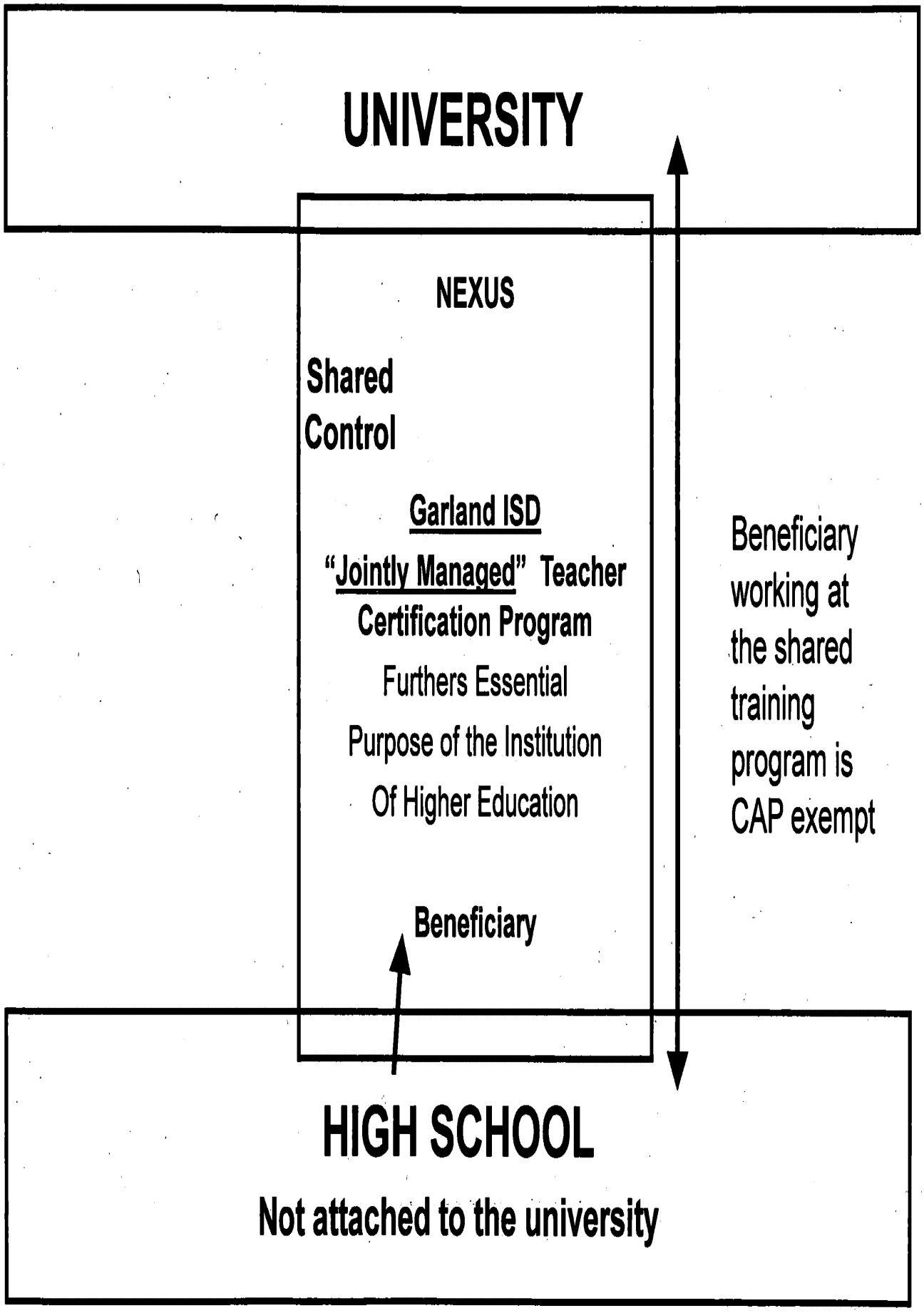
- AAO - Garland Independent School District decision. Public school districts can be affiliated with a institution of higher learning (non precedent decision)

- An affiliation contract must provide for a training/teaching program where the control is shared by the school district and the university or college

AAO's Decision

- AAO ruled that the "Teacher Trak" program that was jointly managed by both entities made Garland ISD attached to Richland U. but only in regards to the Teacher Trak program.

- Thus, only teachers enrolled in the jointly managed Teacher Training programs would be CAP exempt!


UNIVERSITY
NEXUS
Shared
Control
Garland ISD
"Jointly Managed" Teacher
Certification Program
Furthers Essential
Purpose of the Institution
Of Higher Education
Beneficiary
Beneficiary working at the shared training program is CAP exempt
HIGH SCHOOL
Not attached to the university

Teacher Training Affiliation Programs Disqualified

- USCIS has negated the AAO Garland ISD Decision on teacher training affiliations
- Teacher Training programs will no longer qualify as an affiliated program.
- Any school who wants to qualify for a CAP exemption must do so by qualifying in one of the other types of CAP exemptions previously discussed.

Teacher Training Affiliations – Initial Filings vs. Extensions

Because thousands of Teacher Training Affiliation H1Bs were approved:

- We will NOT deny any of these petitions that are extension/same employer filings
- We will deny initial and extension/change of employer filings
- Make sure these filings do not qualify under any of the other CAP exemption conditions.

J-1 CAP Exemptions

- The beneficiary is a J-1 foreign medical graduate who received a waiver of the 2-year foreign residence requirement.
- The J-1 exemption applies only to medical doctors who have received a CONRAD 20/30 waiver under INA 214(l)
- Must work at a hospital designated to be in a needy area.
- This will be covered in detail in the physicians section.

Aliens not subject to the CAP

- Extension validity request within the 6 years.
- Change of employer from one CAP exempt employer to another CAP exempt employer.
- Has reached the 6 year limit but exempt the limit, eligible for recaptured time or AC 21 sec. 104 or 106.
- Prior H1B status continuance.
- Concurrent filing when at least one is CAP exempt.

Concurrent Filing – Two Employers

- An H1B alien can be employed by two separate petitioners at the same time. A separate petition must be filed by each employer

- Concurrent employment may only be granted to an alien seeking employment in the same nonimmigrant classification. For example, an H1B alien may not seek concurrent employment as an H1B1 (HSC), H1B2, H1B3, or vice-versa

H1B Numerical Limitation Exceptions

- The beneficiary was previously counted against the cap once within the last six years and has not reached the maximum allowable time.

- The six years is the total time in H1B status, not calendar years.

LCA General Requirements

- Also called Form ETA 9035
- Every I-129 petition for H-1B classification must have an LCA*.
- LCA has to be certified by Department of Labor (DOL) prior to filing I-129 petition.

•(Except H-1B2 petitions for Department of Defense workers)

LCA Contents

- Employers information
- Required Rate of pay
- Period of employment and occupation information
- Information related to work location
- Employer Labor condition statements
- Public disclosure information
- Declaration of employer
- Contact Information
- Number of alien workers sought

LCA

An LCA is also required for each Standard Metropolitan Statistical Area (SMSA):

- This is an area designated by DOL that requires an LCA
- Usually an SMSA follows county lines, but not always
- We do make some exceptions to crossing SMSA lines in large metropolitan areas like LA/Orange/Riverside/San Diego Counties
- The LCA **does not** constitute a determination that the occupation is a specialty occupation.
- Could be more than one work location on an LCA.

LCA

The idea behind the LCA is to protect U.S. workers' wages and working conditions from imported foreign labor. The employer promises that:

- (1) it won't pay the H-1B employee a below-market wage;
- (2) it will notify its workers of the H-1B employment;
- (3) it won't subject the H-1B employee to sub-standard working conditions;
- (4) it won't hire the H-1B employee to break a strike or otherwise help the employer during a labor dispute; and
- (5) it will keep detailed records of its compliance.

LCA

- Validity dates - employment is only authorized for these dates. The approval dates on the petition cannot be outside the range of the LCA start and end dates.
- LCAs for multiple beneficiaries - In some cases DOL may issue an LCA that is valid for more than one employee
- Because only one alien can be on an H1B petition, the same LCA can be used for multiple petitions if it is designated so on the LCA.
- Petitioner must submit a list of all the prior petitions filed using this LCA each time a new petition is submitted

LCA

- Check validity dates of the LCA
- The petition and LCA must agree on the specific occupation that the beneficiary will be employed
- Both must agree on the actual location where beneficiary will be working
- The LCA must list the location of the aliens work site(s)
- If beneficiary is to work at multiple sites all sites must be listed on the LCA

LCA

- Before filing an I-129 H-1B petition, the petitioner must obtain a Labor Condition Application (LCA)

- Therefore, the LCA must have a certified date that is on or before the receipt date of the I-129 H-1B petition.

- If the LCA is obtained after the filing of the I-129 H-1B petition (or not obtained at all), the petition shall be denied.

Filing the H-1B Petition

An I-129 H-1B Petition can be filed up to 6 months before the requested start date of employment.

What is an H-1B Nonimmigrant Worker?

What is an H-1B Nonimmigrant Worker?

According to 101(a)(15)(H)(i)(b) of the Act –

an alien who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1) of the Act

The H-1 Classification

- **H-1B** Specialty occupation workers
- **H-1B1** Specialty occupation workers under Free Trade Agreements between Chile and Singapore (Vermont Service Center)
- **H-1B2** Department of Defense cooperative research and development project or co-production project
- **H-1B3** Fashion models
- **H-1C** Registered nurses (Vermont Service Center)
- **E-3** Australian E Visa Professional Trade (Vermont Service Center)

Profession

Section 101(a)(32) of the INA defines a profession as:

The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians surgeons and teachers in elementary or secondary schools, colleges, academies, or seminaries.

Specialty Occupation

Section 214(i)(1) of the INA defines "specialty occupation" as an occupation which requires:

1) theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and

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

Two Questions

1. Does the position require a degree?

2. Does the beneficiary have the degree required by the specialty ?

OOH

Department of Labor's Occupational Outlook Handbook located at:

http://www.bls.gov/oco

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Occupational Outlook Handbook, 2010-11 Edition

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Occupational Outlook Handbook (OOH), 2010-11 Edition

For hundreds of different types of jobs—such as teacher, lawyer, and nurse—the *Occupational Outlook Handbook* tells you:

- the training and education needed
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EMPLOYMENT PROJECTIONS

Announcement

Earnings data for two occupations, *airline pilots, copilots, and flight engineers* and *flight attendants*, which appear in many places within the **Career Guide to Industries** and **Occupational Outlook Handbook**, are being removed from the BLS website because these data were incorrect as initially published. These data will be replaced when corrected data become available.

Ways to use the *Occupational Outlook Handbook* site:

1. To find out about a specific occupation or topic, use the Search box that is on every page—enter your search term in the box.
2. To find out about many occupations, browse through listings using the Occupations links that are on the left side of each page.
3. For a listing of all occupations in alphabetical order, select a letter:

   » A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

About the *Handbook*: *The Occupational Outlook Handbook* is a nationally recognized source of career information, designed to provide valuable assistance to individuals making decisions about their future work lives. The *Handbook* is revised every two years.

Manufacturers' agents *see:* Sales engineers

- Manufacturers' representatives *see:* Sales representatives, wholesale and manufacturing
- Manufacturing opticians *see:* Medical, dental, and ophthalmic laboratory technicians
- Map editors *see:* Surveyors, cartographers and photogrammetrists, and surveying and mapping technicians
- Mapping technicians *see:* Surveyors, cartographers and photogrammetrists, and surveying and mapping technicians
- Marble setters *see:* Carpet, floor, and tile installers and finishers
- Margin clerks *see:* Brokerage clerks
- Marine biologists *see:* Biological scientists
- Marine Corps *see:* Job opportunities in the Armed Forces
- Marine electronics technician *see:* Radio and telecommunications equipment installers and repairers
- Marine equipment mechanics *see:* Small engine mechanics
- Marine oilers *see:* Water transportation occupations
- Marine or hydrographic surveyors *see:* Surveyors, cartographers and photogrammetrists, and surveying and mapping technicians
- Mariners *see:* Water transportation occupations
- Marines *see:* Job opportunities in the Armed Forces
- Market and survey researchers
- Market research analysts *see:* Market and survey researchers
- Market research managers *see:* Advertising, marketing, promotions, public relations, and sales managers
- Marketing coordinators *see:* Public relations specialists
- Marketing managers *see:* Advertising, marketing, promotions, public relations, and sales managers
- Marketing research analysts *see:* Market and survey researchers
- Marketing specialists *see:* Public relations specialists
- Marking and identification printing machine operators *see:* Printing machine operators
- Marriage and family therapists *see:* Counselors
- Marshals *see:* Correctional officers
- Marshals and deputy marshals, U.S. *see:* Police and detectives

Occupational Outlook Handbook, 2010-11 Edition

Market and Survey Researchers

Significant Points

Training, Other Qualifications, and Advancement

About this section

While a bachelor's degree is often sufficient for entry-level market and survey research jobs, higher degrees are usually required for advancement and more technical positions. Strong quantitative skills and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data also are important for advancement.

Education and training. A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

While in college, aspiring market and survey researchers should gain experience gathering and analyzing data, conducting interviews or surveys, and writing reports on their findings. This experience can prove invaluable toward obtaining a full-time position in the field, because much of the work may center on these duties. Some schools help graduate students find internships or part-time employment in government agencies, consulting firms, financial institutions, or marketing research firms prior to graduation.

Other qualifications. Market and survey researchers spend a lot of time performing precise data analysis, so being detail-oriented is critical. Patience and persistence are also necessary qualities because these workers devote long hours to independent study and problem solving. At the same time, they must work well with others as market and survey researchers sometimes oversee the interviewing of individuals. Communication skills are important, too, because the wording of surveys is critical, and researchers must be able to present their findings both orally and in writing.

Position Requirements

The petitioner must meet one of the following four 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 positions; 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.

Beneficiary Qualifications

The petitioner must show that the beneficiary meets one of the following four criteria:

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

- Copy of baccalaureate degree
- Should be for a course of study in the specialty that relates to the occupation
- Transcripts

Beneficiary Qualifications

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

- Foreign degree and/or transcripts accompanied by a translation
- Just because the degree says it is a bachelor's degree does not necessarily mean that it is equivalent to a **United States** bachelor's degree.
- RFE for educational evaluation <u>if unable</u> to determine if foreign academic program is equivalent to United States

Beneficiary Qualifications

2) Foreign Degree Con't;

- Generally, the three-year foreign degrees are equivalent to three years of undergraduate coursework at a U.S. institution of higher learning.
- The four-year degrees from India can usually be considered equivalent to a U.S. bachelor's degree, but not always.
- Be careful not to penalize a beneficiary who earns a four-year degree in three years.

Beneficiary Qualifications

3) The beneficiary holds 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;

- Examples are occupations such as teachers, lawyers, engineers, architects, pharmacists, . . .

- Not all occupations requiring licensure are specialty occupations:

  pilots, cosmetologists, flight instructors, barbers, taxi drivers

Beneficiary Qualifications

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

- If the beneficiary does not have a baccalaureate degree, equivalence can be shown with a combination of education and work experience

- The evidence must show that the applicable work experience is that of a position requiring a baccalaureate degree.

Degree Equivalence

(Equivalence to completion of a college degree)

- The beneficiary's education, specialized training, and/or progressively responsible experience may be recognized as equivalent to a baccalaureate degree

- If the beneficiary has knowledge, competence and practice in the specialty occupation that has been determined to be equal to a baccalaureate or higher degree as evidenced by one or more of the following:

Degree 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 Non-collegiate Sponsored Instruction (PONSI);

Degree Equivalence

3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

- For purposes of equivalence, an acceptable evaluation of formal education should show the following:

Credentials Evaluation Service - Foreign Degree Equivalence Only

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

Rating the Evaluation Service

Do your rating first:

- Look at transcripts and credentials to get a feel for whether a beneficiary qualifies for the position **before** looking at the credentials evaluation.

- If the evaluation is reasonably close to your evaluation, particularly if the evaluator's methodology makes sense, you can give the evaluation a higher degree of credibility.

Degree Equivalence

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;

Degree Equivalence

- A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty,
- That the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.
- For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.

Degree Equivalence

- For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty.

- If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation

- That the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation;

Degree Equivalence

and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

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

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

Degree Equivalence

(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.

Degree Equivalence

- Bachelor's Degree – Combination of education, specialized training and/or work experience ("three for one rule")

- Master's Degree - the alien must have **a** baccalaureate degree followed by at least five years of experience in the specialty.

- Ph.D. - If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent (no substitutions for a Ph.D.)

The Final Determination

- Ultimately, the adjudicating officer makes the final determination that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty,

- and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.