U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Public Engagement
Washington, DC 20529

U.S. Citizenship and Immigration Services

Questions and Answers

USCIS Field Operations – American Immigration Lawyers Association (AILA) Meeting
March 21, 2012

Overview

On March 21, 2012, the USCIS Field Operations Division hosted an engagement with AILA representatives. USCIS discussed issues related to adjustment of status, marriage-based interviews, an NTA memo, as well as other issues. The information below provides a review of the questions solicited by AILA and the responses provided by USCIS.

K-1 Adjustment of Status after *Matter of Sesay*

Question 1a: What guidance has USCIS issued to field offices for processing K-1 adjustment of status applications as a result of the BIA decisions in *Matter of Le* and *Matter of Sesay* (AILA Doc. Nos. 11062465 & 11032262)?[1]

Response:

USCIS has drafted guidance related to *Matter of Le* and *Matter of Sesay*. This guidance is currently undergoing internal review and should be issued soon.

On March 17, 2011, the BIA issued *Matter of Sesay*, in which it concluded that there is no requirement that a K-1 fiancé(e)'s marriage to the I-129F petitioner remain intact in order for the K-1 to adjust status.

On June 23, 2011, the BIA issued *Matter of Le*, in which it cited *Sesay* and ruled that there is no requirement that a K-2 remain under 21 years of age in order for the K-2 to adjust status.

Also, keep in mind that *Sesay* addresses only whether a visa as an immediate relative is available. The applicant must still establish the he or she is admissible as an immigrant, and that he or she merits a favorable exercise of discretion. 25 I&N Dec. at 441. Admissibility must exist on the date of adjudication of the adjustment application. 8 CFR 103.2(b)(1), *as amended* 76 *Fed. Reg.* 53764, 53781 (2011).

[1] *BIA Addresses K-2 Age Out Eligibility for Adjustment of Status*, AILA Doc. No. 11062465, http://www.aila.org/content/default.aspx?docid=35983; *Matter of Le*, 25 I&N Dec. 541 (BIA 2011) & *BIA on Adjustment of Status for K-1 Nonimmigrants*, AILA Doc. No. 11032262, http://www.aila.org/content/default.aspx?docid=34910; *Matter of Sesay*, 25 I&N Dec. 431 (BIA 2011).

Question 1b: Please confirm that an I-864 affidavit of support is not required for a K-1 applicant for adjustment under *Sesay*, since a K-1 does not adjust under INA §204.
Response: USCIS does not agree with this contention.

A K-1 seeking adjustment must establish admissibility. 24 I&N Dec. at 441. As the Board held in *Sesay*, the K-1 adjusts as an immediate relative. For this reason, INA 212(a)(4)(C) clearly requires the alien to have an Affidavit of Support, Form I-864, completed by the original sponsor, i.e., the U.S. citizen who petitioned for the nonimmigrant K visa. The K-1's eligibility for classification as an immediate relative has always been predicated on the Form I-129F. 25 I&N Dec. at 439. The affidavit of support rule reflects this practice, by treating the Form I-129F petitioner as the equivalent of an I-130 petitioner. 8 CFR 213.2(b)(1).

If the alien and the original sponsor are divorced, the K-1 may adjust so long as the original sponsor already executed a Form I-864 or is willing to do so. Divorce on its own does not end the I-864 obligation. If the original sponsor never executed a Form I-864, and is not willing to do so, the K-1 will be inadmissible as a public charge.

Note that if the K-1's marriage ends by death, it is likely that the K-1 would be able to adjust as the widow(er) of the citizen petition. In that situation, no I-864 is required.

FDNS Site Visits

Question 2a: Are site visits, other than those conducted through contractors under the Administrative Site Visit Verification Program (ASVVP), performed by local office FDNS officers?
Response: Yes, site visits are conducted by FDNS Immigration Officers.

Question 2b: If the site visits are conducted by the local field office FDNS officers, are the officers specially trained in the visa category involved in the investigation?
Response: All immigration officers, including FDNS Immigration Officers, must go through Adjudicator Basic Training Course for immigration officers. The Basic training course includes training on visa categories. FDNS Immigration Officers verify relationships that are the basis for the transmission of an immigration benefit and also verify the information provided by the petitioner or beneficiary.

Name Changes/Naming Conventions

Question 3: Certain field offices appear to have instructed officers to either require or recommend that female married applicants take their husband's surname, their father's surname, or drop part of a hyphenated surname upon adjudication of an I-485 or N-400. In at least one case, the name change resulted in the individual having various problems, including difficulty enrolling in school. According to the USCIS Adjudicator's Field Manual, chapter 51.4(a), "[a]ny USCIS document is to be issued to the individual in his or her full legal name," and "[a] married woman may choose a legal married name (husband's surname), a legal pre-marriage name (retention of maiden name), or any form of either (e.g., hyphenated name, maiden name and husband's surname)" if supported by appropriate legal documentation. Please issue a reminder to the field on current USCIS policy in this regard.
Response: A reminder regarding this issue was previously provided to the field. If there are offices that are still not following the direction provided in the Adjudicator's Field Manual, please bring it to our attention.

I-551 Stamps on I-829

At a stakeholder engagement on February 24, 2011, USCIS stated that after an I-829 is denied and an NTA is issued, the principal applicant and family members can receive temporary stamps evidencing their continued conditional permanent resident (CPR) status upon request, until there has been an entry of a

final administrative removal order (AILA Doc. No. 11010432).[2] This follows the guidance issued in the Adjudicator's Field Manual chapter 25.2(k) and the Pearson Memo dated March 3, 2000 (AILA Doc. No. 00060722).[3] Two related questions:

Question 4a: Members report that it is common for USCIS not to issue an NTA for a lengthy period after the I-829 is denied. Due to the importance of having evidence of CPR until a final administrative removal order is entered, can the principal applicant and dependent family members receive temporary CPR stamps even if no NTA has been filed?

Response: Please refer to page 16 of the December 21, 2006 Memorandum by Michael Aytes, Associate Director of Operations. This memorandum supersedes the March 3, 2000 Pearson Memorandum and provides updates to Chapter 25.2 of the Adjudicators Field Manual. In the Aytes Memorandum, Immigration Information Officers (IIOs) are instructed that *"[i]f the Form I-829 is still pending **or** has been denied but no final order of removal has been entered, the IIO must collect the expired Permanent Resident Card and follow established procedures for providing a temporary extension of the alien's conditional resident status."* Please note that the Aytes Memorandum describes certain exceptions where no extension of status may be provided (e.g. *"Officers are advised that no extension of status can be given to an alien who not timely filed a Form I-829.")*

Concerning NTA issuance: The existing regulations provide that USCIS "*shall*" institute removal proceedings. *See* 8 CFR 216.6(d)(2). USCIS adheres to this requirement. However, there may be a population of cases falling within Public Law 107-273, where an exception to this rule may apply. USCIS is working to address this population of cases through the promulgation of a final rule. Notwithstanding falling within this class of cases, the procedures for providing a temporary extension continue to apply.

Adjustment of Status

Thousands of I-485 applications filed during the summer of 2007 remain pending due to visa retrogression, even though many applicants have since married, are beneficiaries of approved I-130 petitions, and are now eligible to adjust. In certain cases, AILA members have been told that district adjudicators are unable to issue a final decision on the adjustment because the permanent A-file or original I-485 remains at the service center and/or cannot be matched to the approved petition. Months may go by after an interview, with no decision.

Question 5a: Can the applications and A-file be consolidated immediately upon filing of a new petition or prior to scheduling the interview?
Response: The A file can be consolidated with associated applications and petitions after being requested from the office(s) that have the necessary items and upon receipt of those files, applications, and petitions. Field Operations will raise this concern of delays with Service Center Operations.

Question 5b: If not, what can the attorney do to help move the process along faster?
Response: If the case is within normal processing time, the attorney does not need to intervene. If it is

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[2] *USCIS Q&A for 2/24/11 Quarterly National Stakeholder Meeting*, AILA Doc. No. 11010432, http://www.aila.org/content/default.aspx?docid=34064, http://www.uscis.gov/USCIS/Outreach/Public%20Engagement/National%20Engagement%20Pages/2011%20Events/February%202011/QA%20-%20Quarterly%20National%20Stakeholder%20Meeting.pdf

[3] *INS Instructions on I-829 Adjudications*, AILA Doc. No. 00060722, http://www.aila.org/content/default.aspx?docid=16876, http://www.uscis.gov/files/pressrelease/EB530300a.pdf

outside normal processing time, the attorney may contact the NCSC.

Communication with Field Offices

During the January 7, 2011, liaison meeting, the Field Operations Directorate advised AILA to contact the District Director, the Regional Director, or USCIS Headquarters when all other inquiry channels, such as calling NCSC, e-mailing USCIS, or inquiring with the local supervisor fail to resolve case issues (such as matters delayed for months or years) (AILA Doc. No. 11021031).[4]

Question 6a: Please provide a list of all District Directors and Regional Directors with contact information.
Response: Please see attached.

Question 6b: Please provide the procedures and guidelines for contacting USCIS HQ if the District Director and Regional Director are unable to resolve the problem.
Response: To contact Field Operations HQ, please write:

USCIS Field Operations
111 Massachusetts Avenue NW
Suite 2000, MS: 2030
Washington, DC 20529

Question 6c: Please provide an updated organizational chart for the USCIS Field Operations Directorate.
Response: Please see attached.

Marriage-Based Interviews

Question 7a: Recently, AILA members have reported a significant increase in marriage-based adjustment of status interviews where the parties are either separated (e.g. a Stokes interview) or called in for multiple interviews. Although we understand the importance of Stokes interviews as a means to combat marriage fraud, we are concerned that some offices may be utilizing Stokes-style interviews in situations where it is not warranted. What is current USCIS policy on the use of Stokes interviews? What factors do adjudicators consider when determining whether a Stokes interview is appropriate?
Response: "Stokes" refers to a Federal District Court decision, *Stokes v. INS*, No. 74 Civ. 1022 (S.D.N.Y. Nov. 10, 1976), and technically applies to the New York District. Although Stokes applies only to the New York District, it is of interest to ISOs throughout USCIS, as it not only describes the procedures by which that office deals with the requirements imposed by the court, it also shows how beneficial an effective fraud interview program can be.

An officer may consider interviewing the petitioner and beneficiary separately when there is suspicion regarding the documentation that was submitted, the beneficiary and petitioner have given inconsistent testimony, or other factors that may indicate fraud. It is at the officer's discretionary when determining if parties should be interviewed separately.

Question 7b: AILA members report that certain field offices do not record interviews. The recording of an interview protects the adjudicator from false allegations of misconduct, offers protections to the applicant, and preserves the record for evidence in a future removal proceeding or appeal.[5] What is

[4] *AILA/USCIS Field Operations Liaison Meeting Q&As* (1/7/11), Q8; AILA Doc. No. 11021031, http://www.aila.org/content/default.aspx?docid=34452

[5] AFM section 15.9 discusses the videotaping of interviews.

USCIS's current policy on the recording of interviews? Will USCIS issue guidance requiring field offices to record all Stokes interviews in order to protect the rights of all parties?
Response: USCIS is currently reviewing when interviews should be recorded, and will not issue guidance at this time requiring all marriage separation interviews to be recorded.

NTA Memo

On November 7, 2011, USCIS issued a Policy Memorandum on the referral of cases and issuance of notices to appear in cases involving inadmissible and removable aliens (AILA Doc. No. 11110830).[6] We applaud USCIS for this guidance which is a welcome change and reflects the service-minded focus of the agency. However, we like to take this opportunity to highlight areas where clarifications or revised procedures could better advance the goals which the memo set out to achieve:

Part I: Fraud Cases with a Statement of Findings Substantiating Fraud

The memo broadly outlines the requirement that a "Statement of Findings" (SOF) must be part of the record to substantiate a finding of fraud. The memo states that USCIS "**will issue**" an NTA when an SOF substantiating fraud is part of the record. However, AILA is concerned this fails to provide the regulatory safeguards provided under 8 CFR §103.2(b)(16)(i).[7] As a general matter, given the permanent consequences of a fraud finding, we urge USCIS to provide clear instructions to officers and stakeholders on SOF/NTA procedures in this context.

Question 8a: What training has been or will be given to field officers regarding the SOF?
Response: All FDNS Immigration Officers are provided training on how to write SOFs and what information to include in SOFs. FDNS Immigration Officers provide regular training to ISOs, which may include information about SOFs. ISOs also receive fraud detection training as part of their Basic training.

Question 8b: *Suspected Fraud*. Where an officer merely suspects fraud, will Field Operations instruct officers to issue a Request for Evidence, in order to give the applicant notice of the derogatory information and an opportunity to respond as required under 8 CFR §103.2(b)(16)(i)?
Response: If fraud is suspected, an ISO may first refer the case to FDNS for additional review and possibly a site visit. If appropriate, prior to denying a case for fraud, the ISO, may issue a Notice of Intent to Deny (NOID) per 8 CFR §103.2(b)(8) and 8 CFR § 103.2(b)(16)(i).

Question 8c: *Prior Marriage Fraud Finding*. A finding of marriage fraud creates a permanent bar to the approval of future employment and family-based petitions under INA 204(c)(1).[8] As the basis for denying a subsequent petition, officers sometimes refer only generally to a prior finding of marriage fraud. The omission of additional information severely limits the ability of the applicant to defend against a past

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[6] *USCIS Revises guidance on the Referral of Cases and Issuance of NTAs in Cases Involving Inadmissible and Removable Individuals*, AILA Doc. No. 11110830, http://www.aila.org/content/default.aspx?docid=37578

[7] 8 CFR §103.2(b)(16)(i) states: "If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding."

[8] INA 204(c)(1) states: "no visa petition may be approved under INA §204 if the "alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws…"

fraud finding and is counter to the regulation. Moreover, in *Matter of Tawfik*, the Board of Immigration Appeals (BIA) held that the evidence of a fraudulent marriage "must be documented in the alien's file and must be substantial and probative."[9] The BIA further stated, "the district director should not give conclusive effect to determinations made in a prior proceeding, but, rather, should reach his own independent conclusion based on the evidence before him."

Question 8.c.i: How does the November 7, 2011 memo square with *Matter of Tawfik?*
Response: The November 7, 2011 memo describes the categories of cases in which USCIS will issue an NTA. The memo does not alter the standards, including the applicability of *Matter of Tawfik*.

Question 8.c.ii: Will supervisory review be required before an SOF and NTA are issued in a fraud case?
Response: Yes.

Question 8.c.iii: Will a finding of fraud in a prior adjudication automatically result in an SOF substantiating fraud?
Response: Not necessarily. The facts of each case are assessed individually.

Question 8d*: Material Misrepresentation*. The statute distinguishes between fraud and material misrepresentation.[10] According to the Foreign Affairs Manual, material misrepresentation does not require an "intent to deceive" or that the officer believes and acts upon the false representation.[11] How will cases involving misrepresentation (but not fraud) be treated?
Response: The November 7, 2011 memo describes the categories of cases in which USCIS will issue an NTA. Accordingly, the memo does not alter the standards for adjudicating underlying benefits, including ineligibility based on a finding of fraud or misrepresentation.

Question 8e: *Final Adjudicative Action*. The memo indicates that an NTA will be issued "upon final adjudicative action on the petition and/or application or other appropriate eligibility determination." Will applicants be provided the opportunity to apply for a §212(i) waiver to waive the underlying fraud before an NTA is issued?
Response: Adjudication of an I-485 includes determination as to the applicant's admissibility. Adjudication of waivers of inadmissibility is normally a part of the determination as to whether an individual is admissible and eligible to adjust status. Generally, if a waiver application is received during the adjudicative process, it will be adjudicated before final adjudicative action on the I-485.

In some case, an applicant may be inadmissible on a ground for which a waiver may be available, but may not have applied for the waiver. In such a case, USCIS will generally notify the applicant of the need to file the waiver application before adjudicating the adjustment application. This step may not be appropriate if the applicant is also inadmissible on a ground for which no waiver is available. Also, unlike most other waivers, USCIS has long taken the position that an application for a waiver of the exchange alien's foreign residence requirement under section 212(e) must be filed and approved before the individual can apply for adjustment.

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[9] *Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990).

[10] INA §212(a)(6)(C)(i). *See also* 9 FAM 40.63 N3(a) "The fact that Congress used the terms 'fraud' and 'willfully misrepresenting a material fact' in the alternative indicates an intent to set a lower standard than is required in making a finding of what is known in the law as fraud."

[11] 9 FAM 40.63 N3, *citing Matter of S- and B-C-*, 9 I&N 436, 448-49 (AG 1961) and *Matter of Kai Hing Hui*, 15 I&N 288 (1975).

Part II(A): Cases to be Referred to ICE for Decision on NTA Issuance

Question 9a: USCIS will refer egregious public safety (EPS) cases to ICE prior to adjudication, even if the case can be denied on the merits. One of the EPS circumstances is crimes of violence for which the term of imprisonment imposed, or where the penalty for a pending case, is at least one year as defined in INA §101(a)(43)(F). This includes all crimes where the use of force is directed at persons or property, and will encompass many minor petty and municipal offenses, such as criminal mischief, graffiti, bar fights, playground incidents, and other minor offenses. In light of this, we urge USCIS to reconsider the language in the memo mandating referral to ICE for pending cases where the *potential* penalty is one year.

Response: USCIS will not currently amend the language regarding referral of EPS cases to ICE. However, please note that referral to ICE of an EPS case may not result in issuance of an NTA or in detention of the individual.

Part II(B): NSEERS

Question 9b: The memo states that "USCIS will refer all cases in which an application is denied based on an NSEERS violation to ICE for possible NTA issuance." However, in May 2011, DHS suspended the NSEERS program by "de-listing" NSEERS country designations (AILA Doc. No. 11042760).[12] Rather than referring such cases to ICE to initiate an enforcement action, we ask USCIS to stop denying applications for immigration benefits where the sole issue is an alleged NSEERS violation.

Response: USCIS has drafted guidance relating to potential NSEERS violators and DHS's suspension of the NSEERS program. This guidance is currently undergoing internal review and should be issued soon.

Part III: Naturalization

Question 10: AILA appreciates the inclusion of supervisory review officers and USCIS counsel on the N-400 NTA Review Panels. Will the attorney of record or applicant be notified when the officer forwards the written recommendation to the Review Panel?

Response: Referral to the NTA Review Panel is an internal process and neither the Attorney of Record nor the applicant will be notified during the referral stage.

[12] *DHS Notice Withdrawing NSEERS Country Designations,* AILA Doc. No. 11042760, http://www.aila.org/content/default.aspx?docid=35216; 76 FR 23830 (4/28/11)