



Questions and Answers

USCIS National Benefits Center – American Immigration Lawyers Association Teleconference May 11, 2012

Overview

On May 11, 2012, the USCIS National Benefits Center (NBC) hosted a teleconference with American Immigration Lawyers Association (AILA). Among the issues USCIS discussed are new NBC initiatives, employment authorizations, and Adam Walsh Act Cases. The information below provides a review of the questions solicited by AILA and the responses provided by USCIS.

New NBC Initiatives, Staffing Updates, Organizational Chart

Question 1: Please provide an update on any new NBC initiatives that are either currently in process or are scheduled for the remainder of the year.

Response 1:

N-Forms

On October 30, 2011, USCIS Lockbox facilities began accepting Forms N-300/N-336/N-600/N-600K which are sent to NBC.

- NBC will adjudicate all N-300's, Application to File Declaration of Intention. As of 5/11/12, NBC has received 31 cases for adjudication. 22 have been adjudicated, 9 are pending. Average processing time from receipt to adjudication is currently 40 days.
- N-336's, Request for a Hearing on a Decision in Naturalization Proceedings, will be forwarded directly to the Field Office that denied the underlying N-400. If the N-336 is filed more than 30 days after the denial of the N-400, NBC will request the A-file if it is located at the NRC. As of 5/11/12, NBC has received 2,064 cases and these were processed and transferred to the Field Office in an average of 23 days.
- N-600's, Application for Certificate of Citizenship, will be sent to the Field Office that has jurisdiction over the applicant's home address. As of 5/11/12, NBC has received approximately 31,000 cases and these were processed and transferred to the Field Office in an average of 43 days. NBC will reject an application, if a previously filed N-600 was filed and denied. As of 5/11/12, NBC has rejected 139 N-600's.

- N-600K, Application for Citizenship and Issuance of Certificate under Section 322. As of 5/11/12, NBC has received 2,671 cases and these were processed and transferred to the Field Office in an average of 43 days. If the N-600K applicant has not indicated at which office he would like to interview, the NBC will attempt to contact the applicant and/or the applicant's parent(s), guardian(s), or grandparent(s) to determine which USCIS Field Office should receive the application.

I-485, Section 13

Last summer, NBC assumed responsibility for final adjudication of I-485 applications for Adjustment of Status under Section 13 of the Immigration and Nationality Act of 1957. The adjustment procedure is available to certain applicants who performed diplomatic or semi-diplomatic duties and their families. After the interview is conducted at the Field Office, the file is sent back to NBC. We liaison with Department of State to get its recommendation, make the final decision, and track DOS visa issuance to ensure USCIS stays within the 50 adjustment limit per year. We anticipate receiving 600 applications per year.

I-191

In June, 2011, NBC began adjudicating Form I-191, Application for Advance Permission to Return to Unrelinquished Domicile. NBC will review the file and make a final decision on most cases. If we are unable to retrieve the applicant's permanent alien file, the application may go the Field Office for the final decision. We anticipate receiving 200-300 applications per year.

EOIR Cases

USCIS HQ and NBC are working together on an initiative to consider the feasibility of NBC taking the I-485 workload of applications that Texas Service Center currently receives per USCIS Pre-Order Instructions. We anticipate this may begin sometime in 2013.

I-485 VAWA Cases

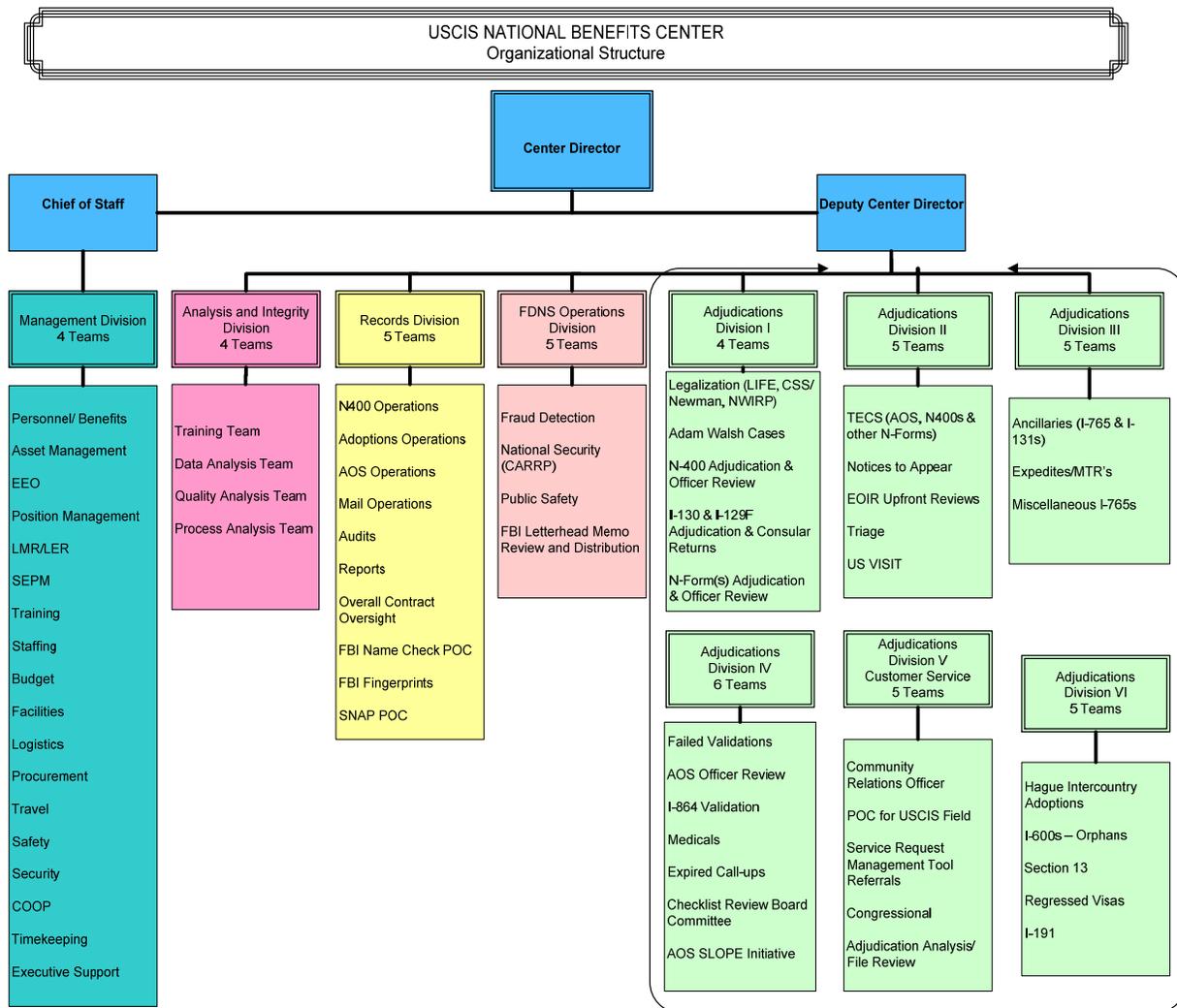
On 5/15/12, NBC incorporated VAWA I-485 applications from the Vermont Service Center (VSC) into our initial evidence review process. NBC's process includes conducting background and security checks, as well as a review for required initial evidence for a VAWA adjustment of status case. When NBC has completed its process, the cases are shipped to the local Field Office with jurisdiction for manual scheduling of the interview. NBC estimates that the workload will be approximately 7,500 cases per year.

Question 2: Please provide an update on any key staffing changes that have taken place since our last meeting in October 2011.

Response 2: Since October, 2011, NBC has filled three Assistant Center Director (ACD) positions in Adjudications. One ACD retired and two ACD's moved to positions in HQ.

Question 3: Please provide us with an updated NBC organizational chart.

Response 3: Please see below.



Guidance on Adjudicating Cases Under Matter of Sesay

Question 4: On March 17, 2011, the BIA decided *Matter of Sesay*, 25 I&N Dec 431(BIA 2011). According to *Matter of Sesay*, an alien who entered the US as a K-1 may be granted adjustment of status under sections 245(a) and (d) of the Act, even if the marriage to the fiancé(e) visa petitioner does not exist at the time that the adjustment application is adjudicated, if the applicant can demonstrate that he or she entered into a bona fide marriage within the 90-day period to the fiancé(e) visa petitioner. In response to questions posed to USCIS and USCIS Field Operations on adjudicating cases under *Matter of Sesay*, AILA has been informed that guidance is forthcoming. Has NBC received any guidance for *Matter of Sesay* cases? If so, what is the guidance? If not, when do you expect to receive it?

Response 4: On 3/21/12, USCIS provided responses to AILA questions related to Matter of Sesay. The following is a link to that record on the [USCIS website](#).

Eligibility for Employment Authorization for Aliens Whose Removal Proceedings Have Been Administratively Closed

Question 5: An alien who has submitted an application for relief, such as an application for asylum (Form I-589), application for adjustment of status (Form I-485), or application for cancellation of removal

(Form EOIR-42A/B), and whose case has been administratively closed in the exercise of prosecutorial discretion, continues to have an application “pending” for purposes of eligibility for employment authorization under 8 C.F.R. § 274a.12(c)(8), (9), or (10).

Please describe the evidence that an applicant for employment authorization should submit to establish that the application for relief remains pending.

Response 5: The burden is on the applicant to establish that he/she is eligible for employment authorization at the time of filing per 8 CFR 103.2(b)(1).

An applicant for work authorization under the (c)(9) subparagraph should submit initial evidence with the application which establishes that a Form I-485, pursuant to Section 245 of the INA, is currently pending with the court. If the applicant establishes eligibility, and USCIS determines that the applicant warrants a favorable exercise of discretion, USCIS will approve the application. If the applicant does not establish that he/she is eligible for employment authorization at the time of filing, the application may be denied. Acceptable proof that a Form I-485 is pending before the Immigration Judge may be a copy of the file stamped I-485 received by the Immigration Court, or other Court or USCIS document which indicates an I-485 application is pending with the Court at the time the I-765 is filed.

If proceedings are administratively closed before the judge adjudicates the I-485, the I-485 remains pending. A copy of any record or order of the court indicating the proceedings have been administratively closed should be submitted at the time of filing.

An applicant for work authorization under the (c)(10) subparagraph should submit initial evidence with the application which establishes that a Form EOIR-42A/B, or EOIR-40, is currently pending with the Court. Acceptable proof that Form EOIR-42A/B, or EOIR-40, is currently pending before the Immigration Judge may be a copy of the file stamped EOIR-42A/B, or EOIR-40, received by the Immigration Court, or other Court or USCIS documents that indicate that the EOIR-42A/B, or EOIR-40, is pending at the time the I-765 is filed.

If proceedings are administratively closed before the judge adjudicates the EOIR-42A/B, or EOIR-40, application remains pending. A copy of any record or order of the court indicating the proceedings have been administratively closed should be submitted at the time of filing.

Please note that NBC does not adjudicate I-765 applications based on an asylum application for persons in proceedings.

I-485s for Aliens in Proceedings Erroneously Filed at NBC

Question 6: NBC recently informed AILA that in cases where the alien is in proceedings, and where the I-485 is erroneously filed with NBC instead of TSC, NBC will enter the I-485 into the database, issue a receipt and hold the file. Thank you for adopting this new procedure. Can you please tell us what prompted this change in procedure and how it is working so far?

Response 6: In February, 2012, NBC began administratively closing I-485 applications filed at the Chicago Lockbox by non-arriving aliens that are under EOIR jurisdiction, rather than deny for lack of jurisdiction. A concurrently filed I-765 will be adjudicated by NBC.

This change aligns our process with recent guidance provided by both ICE and USCIS.

Change of Attorney Address

Question 7: The minutes from the October 21, 2011 NBC/AILA Liaison meeting (see AILA Doc. No. 12021460) reflect that attorneys and accredited representatives may change their address with NBC via a written letter as an alternate procedure to submitting a new G-28. The minutes describe the information

that the letter should contain, and note that it should be mailed to the following address: USCIS National Benefits Center, P.O. Box 648006, Lee's Summit MO 64002. Further, NBC stated that if there is a problem with a change of address for an attorney or representative, AILA Liaison may contact NBC or the attorney or representative may contact the National Customer Service Center (NCSC) at 1-800-375-5283.

It does not appear that either the attorney/representative, or the applicant/petitioner is notified when the change of address is processed. Would NBC consider implementing a process to notify the attorney or representative and applicant/petitioner when the change of address is recorded?

Response 7: NBC's current process to change the address of an attorney representative or accredited representative is correct as described above.

NBC will reach out to Service Center Operations and HQ to determine what the Agency's standard is regarding a written notification to an attorney/representative of an updated address in our systems. A change in this process will depend on what the Agency standard is currently.

Adam Walsh Act Cases

Question 8: Could you please explain the timing for processing Adam Walsh Act cases? AILA has been informed that there is a 4-5 month lag time between the date NBC receives the petitioner's fingerprint results and the date a request for evidence (RFE) or notice of intent to deny (NOID) is issued. Also, it appears that adjudication of these cases is taking 10 months from the receipt of the NOID response. Please provide current processing times for Adam Walsh Act cases from receipt to final adjudication. Can you please explain the reason for the lengthy processing timeframe?

Response 8: In most instances, an Adam Walsh Act (AWA) case is identified when NBC conducts security and background checks on the petitioner before shipping the file to the Field Office prior to interview.

When background checks reveal a specified offense under AWA, the I-130 petition and I-485 application are forwarded to NBC's Background Check Unit (BCU) for review. If BCU determines that the case meets the requirements for adjudication under AWA, the interview appointment is de-scheduled and BCU sends the file to NBC's AWA team for processing and possible adjudication.

The AWA team will schedule the petitioner for a fingerprint appointment. When fingerprint results confirm that the petitioner and the subject of the specified AWA offense are the same, an RFE/Notice of Intent to Deny (NOID) is issued to the petitioner to address the AWA concern. The petitioner will have 87 days to respond to an RFE/NOID.

Depending on the evidence received from the petitioner, the officer may either deny the petition and application, or forward the petition and application to the field for interview.

NBC reviewed the processing times of the case AILA provided. NBC will address this issue further by:

- Evaluating the workflow process of this product line to address timeliness issues,
- Creating tracking tools to monitor the processing times of cases, and
- Allocating additional officer resources to reduce processing times.

Thank you for raising this issue. If AILA believes an AWA case is not being processed in a timely manner, an AILA committee member may contact the NBC to request assistance.

Procedure when Priority Date Becomes Current

Question 9: Other than calling the NCSC, is there any additional process for alerting NBC that a family-based case has become current? Does NBC conduct sweeps or run reports to capture these cases and take action on its own initiative? If so, how frequently?

Response 9: When a visa becomes available for a regressed visa case, the Department of State (DOS) will notify NBC via a dedicated email account that NBC provides for this purpose.

Additionally, NBC conducts monthly electronic searches of pending cases at NBC to identify those that have a current priority date.

When a visa number becomes available for a pending case, NBC will review the case to determine if the applicant is still eligible for the benefit and make sure fingerprint results are still valid. If the applicant is eligible for the benefit, NBC will adjudicate the application.

However, if an attorney representative needs to alert NBC that a visa for a regressed family-based case has become current, he/she may call the NCSC at 1-800-375-5283, or an AILA committee member may contact NBC to request assistance.

RFEs for I-131s and I-765s

Question 10: Members have reported RFEs being sent for the physical address of the beneficiary, where the attorney lists his or her address on the forms for EAD and advance parole documents. *See* MSC1290212816, MSC1290389287, MSC1290389288, MSC1290389296, MSC1290389297, MSC1290389290, MSC1290389291, MSC1290389293, MSC1290389294.

What is NBC's policy for sending EAD and advance parole documents when the attorney's address is listed on these forms?

Response 10: NBC's policy is to comply with the Regulation at 8 CFR Subsection 103.2(b)(19) which states:

Notification. An applicant or petitioner shall be sent a written decision on his or her application, petition, motion, or appeal. Where the applicant or petitioner has authorized representation pursuant to § 103.2(a), that representative shall also be notified. Documents produced after an approval notice is sent, such as an alien registration card, shall be mailed directly to the applicant or petitioner.

If the attorney's address is listed on the application rather than the applicant's address, and the applicant has not requested that the card be mailed to the attorney's address, NBC will attempt to determine the applicant's address from other pending applications, if possible. However, if necessary, NBC will send an RFE for the correct address of the applicant to the representative, if a G-28 is on file. The applicant's address should be submitted on the application so that there are no delays in processing of the requested benefit.

NBC understands that in certain cases an applicant's card may be stolen or misplaced if it is sent to their home address. NBC will make an exception to the Regulation when an applicant provides a written request to have the EAD card sent to the representative's address.

Unavailability of Birth Certificates

Question 11: Our understanding is that proof of unavailability of a birth certificate is not required where the Foreign Affairs Manual or State Department Reciprocity Table indicates that birth records are not available. Notwithstanding this, we are receiving RFE's requesting birth certificates or "proof" there is no government issued birth certificate in family-based adjustments of status in cases where we told the Service in our initial submission that no birth certificate existed and provided alternative documentation (i.e. affidavits of birth and DNA). The member that submitted this question provided two examples. In both cases, the RFE includes a second page citing language from the FAM which clearly states that birth certificates are not available at the times and places of these beneficiary's birth. In both these cases, the beneficiary is the parent of a USC. In one case we provided affidavits of birth and in the other we

provided one affidavit of birth and a DNA test. Please confirm that a letter from the foreign government confirming the birth certificate is unavailable is not required when the FAM or reciprocity schedule states that birth records are not available. This is a huge burden for people living in the US without family members back in the home country or even for those abroad that live in remote places.

Response 11: Thank you for bringing this concern to our attention. NBC has reviewed the case specific examples that were provided by AILA to determine whether an error occurred in our process.

NBC is analyzing its checklist review process to ensure that an RFE will not be issued for a birth certificate when the Department of State (DOS) Foreign Affairs Manual (FAM) indicates that a birth certificate is not available based on date of birth. In those instances, NBC will then determine if secondary evidence or birth affidavits were submitted to include English translation(s). If necessary, an RFE will be issued for secondary evidence, birth affidavits, and English translation(s).

Title 8 CFR 103.2(b)(2) states:

(2) Submitting secondary evidence and affidavits.

- (i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as a church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Per the AFM 11.1(f), . . . Secondary evidence is evidence which makes it more likely that the fact sought to be proven by the primary evidence is true, but cannot do so on its own face, without any external reference. In the above example, church records showing that an individual was divorced at a certain time would be secondary evidence of the divorce. You will often encounter situations in which primary evidence is unavailable. . . A petitioner or applicant cannot simply assert that the primary evidence does not exist. The absence of a primary record, instead, must be proven either:

- By a written statement from the appropriate issuing authority attesting to the fact that no record exists or can be located, or that the record sought was part of some segment of records which were lost or destroyed; or
- By evidence (such as an affidavit) "that repeated good faith attempts were made to obtain the required document or record."

If an attorney representative believes NBC has incorrectly issued an RFE in a case regarding the unavailability of birth certificates, he/she may call the National Customer Service Center, or an AILA Committee Member may contact NBC to request assistance.

Transfer of Filing Basis from Section 13 to Diversity Visa Lottery

Question 12: NBC recently indicated that an applicant who has filed an I-485 application under Section 13 may not request to transfer the basis of the filing to a Diversity Visa (DV) Lottery basis. Please review this matter to determine if NBC's response is correct.

Response 12: NBC's response to the AILA Liaison regarding this question was incorrect. The applicant may request a transfer of basis from a pending Section 13 I-485 application to a DV Lottery basis or other basis.

For guidance relating to the transfer of basis, please refer to the Adjudicators Field Manual (AFM) at Section 23.2(1)(2) of the Adjudicator's Field Manual. Section 23.2(1)(2) states the following:

- A new application to adjust status under a different eligibility is not required.
- The request for conversion from one eligibility to a different eligibility must be made in writing.
- The applicant must be eligible for the change from one basis to another, and
- There must be no break in the continuity of the underlying eligibility for adjustment prior to the submission of the conversion request.

The written request to transfer the basis of eligibility of a pending I-485 application should be sent to the office where the pending application is located.

When an applicant wishes to transfer the basis of a pending Section 13 I-485 to DV Lottery basis, the applicant or representative may send the written request for a transfer of basis to NBC along with a copy of the "Notification of Selectee Letter" starting with "Congratulations" from the Department of State containing the applicant's DV case number. This letter states the applicable DV year and fiscal year in which the applicant is eligible. Based on this request, and proof of eligibility under the DV Lottery program, NBC will ship the case to the local Field Office. Interviews for DV Lottery cases are manually scheduled by the Field Office with jurisdiction.

NBC notes that "winning" the State Department's annual DV "lottery" does not ensure that an applicant will be found eligible to adjust status on the basis of the DV program. Selection in the "lottery" merely renders the person eligible for further processing for a DV visa (or adjustment of status) in the relevant fiscal year.

An alien may not apply for adjustment of status before the current State Department Visa Bulletin indicates that a DV visa number has become available to the person in question. USCIS has procedures in place to process DV adjustment applications in an expeditious manner, but because of existing variables (e.g., admissibility, need to complete background checks), it is impossible to guarantee that the agency can approve a given I-485 application before the end of the relevant fiscal year.

If an attorney representative wishes to request assistance with a transfer of basis case they may call the National Customer Service Center, or an AILA Committee Member may contact NBC to request assistance.